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IN THE

Supreme Court of the United States

October Term, 1967

No. 995

NASHVILLE I-40 STEERING COMMITTEE, an Unincorporated Association, and Its Individual Members, etc., *et al.*,

Petitioners,

v.

BUFORD ELLINGTON, Governor, State of Tennessee; CHARLES W. SPEIGHT, Commissioner of Highways, State of Tennessee; and BEVERLY BRILEY, Mayor of the Metropolitan Government of Nashville and Davidson County, Tennessee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BUFORD ELLINGTON, Governor, State of Tennessee; CHARLES W. SPEIGHT, Commissioner of Highways, State of Tennessee; and BEVERLY BRILEY, Mayor of the Metropolitan Government of Nashville and Davidson County, Tennessee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on December 18, 1967.[1]

---

[1] The petitioners are Nashville I-40 Steering Committee, an unincorporated association, and its members, Flournoy A. Coles, Jr., Chairman; and Mansfield Douglas, III, Newt A. Solomon, Inman Otey, Flem B. Otey, III, Harold M. Love, William H. Fort, N. E. Douglas, J. L. Campbell, A. L. Porter, J. E. Vaughn, H. H. Turpen, Eleanor Landreau, Paul Puryear, Leonard Beech, Parker Coddington, Louis Aatdl, Andrew White, Nelson Fuson, E. H. Mitchell, Noella Mitchell, Henry Tomes, N. Samuel Jones, Marian Fuson, D. W. Williams, L. L. Dickerson, Webster Cash, James L. Garrett, Odessa Hoggatt and Martha Ragland.

Citations to Opinions Below

The memorandum opinion of the District Court, filed November 2, 1967, is unreported and is printed in the appendix, *infra* pp. 1a-3a. The opinion of the Court of Appeals is not yet reported and is printed in the appendix, *infra* pp. 4a-16a.

Jurisdiction

The judgment of the Court of Appeals was entered on December 18, 1967 (appendix p. 18a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

Whether petitioners are entitled to an injunction restraining the construction in North Nashville, Tennessee, a predominantly Negro area, of a three mile section of an interstate highway which traverses Tennessee, on the ground that:

(1) The route is racially discriminatory, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States;

(2) State highway officials failed to comply with Section 116(c) of the Federal-Aid Highway Act of 1956 (70 Stat. 385) by not having a public hearing with proper notice on the proposed route;

(3) State highway officials failed to comply with Section 116(c) mandating a consideration of the "economic effects" of proposed highway location.

Statute and Regulation Involved

1. Section 116(c) of the Federal-Aid Highway Act of 1956, 70 Stat. 385, provides as follows:[2]

Sec. 116. Declarations Of Policy With Respect To Federal-Aid Highway Program.

* * *

(c) Public Hearings.—Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Commissioner of Public Roads that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location: *Provided,* That, if such hearings have been held, a copy

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[2] The currently applicable law, which the court below said does not differ materially from the 1956 version quoted above, is found in 23 U.S.C. §128. The amendments to the 1956 version were added by the Federal-Aid Highway Act of 1958, 72 Stat. 89. The laws were recodified and Title 23 was enacted into positive law by P.L. 85-767, 72 Stat. 885, 902. The current 23 U.S.C. §128 states:

§128. Public hearings.—(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification. (Aug. 27, 1958, P.L. 85-767, 72 Stat. 902.)

of the transcript of said hearings shall be submitted to the Commissioner of Public Roads, together with the certification.

2. Title 23, C.F.R., §1.6 *Federal-aid highway systems.*

(a) *Selection or designation.* To insure continuity in the direction of expenditures of available funds, systems of Federal-aid highways are selected or designated by any State that desires to avail itself through its State highway department of the benefits of Federal aid for highways. Upon approval by the Administrator of the selections or designations by a State highway department, such highways shall become portions of the respective Federal-aid highway systems, and all Federal-aid apportionments shall be expended thereon.

(b) *Revisions.* A State highway department may propose revisions, including additions, deletions or other changes, in the routes comprising the approved Federal-aid highway systems. Any such revision shall become effective only upon approval thereof by the Administrator upon a determination that such revision is in the public interest and consistent with Federal laws. There is no predetermined time limit for the submission of the full selection of the systems.

(c) *Selection considerations.* Each Federal-aid system shall be so selected or designated as to promote the general welfare and the national and civil defense and to become the pattern for a long-range program of highway development to serve the major classes of highway traffic broadly identified as (1) interstate or interregional; (2) city-to-city primary, either interstate or intrastate; (3) rural secondary or farm-to-market; and (4) intraurban. The conservation and development of natural resources, the advancement of economic

and social values, and the promotion of desirable land utilization, as well as the existing and potential highway traffic and other pertinent criteria are to be considered when selecting highways to be added to a Federal-aid system or when proposing revisions of a previously approved Federal-aid system.

(d) • • •

(e) • • •

(Published in the Federal Register, 25 F.R. 4162, May 11, 1960).

Statement of the Case

Summary of Proceedings in the Courts Below

Petitioners seek an injunction restraining consrtuction of a three-mile segment of Interstate Highway 40 (hereinafter called I-40) which has been routed so as to pass through a Negro neighborhood in Nashville, Tennessee known as North Nashville. The proceedings below were greatly expedited. The complaint filed October 26, 1967, in the District Court for the Middle District of Tennessee, alleged federal jurisdiction under 28 U.S.C. §§1331(a) and 1343(3) and 42 U.S.C. §§1981, 1982, 1983 and 2000d. Petitioners assert that the proposed route is racially discriminatory in violation of their Fourteenth Amendment rights and also that the state highway department failed to comply with Section 116(c) of the Federal-Aid Highway Act of 1956 by not giving proper notice of a public hearing on the proposed route and by not adequately considering the "economic effects" of the proposed route in accordance with federal statutory requirements. Petitioners are a group of thirty businessmen, ministers, faculty members of Fisk, Meharry and Vanderbilt Universities, officials of civic and civil rights organizations, and residents of North Nashville who formed

an association to oppose the proposed routing of I-40. Respondents are the Governor of Tennessee, the State Commissioner of Highways and Nashville's Metropolitan Mayor.

When suit was filed the District Court promptly held an evidentiary hearing on a motion for preliminary injunction. The District Court denied relief, finding that although petitioners proved that "*the proposed route will have an adverse effect on the business life and educational institutions of the North Nashville community*" and that "*the consideration given to the total aspect of the link on the North Nashville community was inadequate,*" there was no proof of "a deliberate purpose to discriminate" racially (2a). The Court rejected plaintiffs' statutory arguments stating that they were matters to be decided by the Bureau of Public Roads of the Department of Transportation (1a). The action was dismissed as to the Mayor of Metropolitan Nashville and Davidson County (1a).

To preserve the *status quo* pending appeal a panel of the Sixth Circuit on November 13, 1967, restrained the Commissioner of Highways from proceeding with construction of the road segment or awarding contracts. After an expedited appeal, the Court of Appeals affirmed, except as to the order dismissing the cause against Mayor Briley which was reversed (15a-16a). The per curiam opinion rendered December 18, 1967, upheld petitioners' standing to maintain the action, relying upon *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F.2d 608 (2nd Cir. 1965), cert. den. 384 U.S. 941 (6a-7a). The Court ruled that the notice of the public hearing on the road was given in "an unsatisfactory way" and that the incomplete transcript of the hearing "leaves much to be desired," but nevertheless declined to grant relief stating that due to extensive publicity no literate citizen of the community could

have been unaware of the approximate location of the highway (7a). The petitioners' statutory argument that the highway department failed to consider the economic effects of the proposed location was rejected by the court, which relied upon the certification of a state official that economic effects had been considered and "the presumption of regularity of public records and compliance by public officials with duties imposed upon them by statute" (12a). Notwithstanding this holding, the court below in another portion of its opinion quoted with approval the trial judge's finding that "The proof shows that the consideration given to the total impact of the link of I-40 on the North Nashville community was inadequate" (14a). As to the equal protection claim, the Court said the record failed "to show any intent or purpose of racial discrimination" and rejected petitioners' argument that they were not required to prove discriminatory motive (12a).

Finally, the Court ruled that the District Judge had discretion to deny relief considering the balance of the equities (13a-14a).

Summary of Facts

This lawsuit involves a proposed three mile long segment of interstate highway route I-40 located within the city of Nashville, Tennessee.[3] It is a small part of a thousand mile system of interstate roads planned in Tennessee (Tr. 54-55), and the forty-one thousand mile national interstate system

[3] Route I-40, when completed, will stretch from Greensboro, North Carolina to Barstow, California. Rand-McNally Highway Atlas of the United States, 43rd Ed. 1967, inside front cover. The court of appeals states that the section in question is 3.6 miles long (4a). By so stating the court probably included a section of the inner loop between a proposed interchange at 11th and 12th Avenues North and the Cumberland River. Petitioners are not asking that the construction of this section—which is not a part of I-40—be enjoined. (See map, plaintiffs exhibit 31.)

planned under the Federal-Aid Highway program. The disputed route is designed to connect the westbound leg of the highway leading toward Memphis with an "inner loop" circling the center of Nashville and connecting other interstate roads. The disputed segment also forms the northern part of a designed outer half-loop road (Plf. Exh. 4). It cuts across the heart of the section called North Nashville, the principal Negro area of the City. Jefferson Street is the axis of the Negro ghetto (Tr. 32-33, 180, 262).

There are 234 Negro owned businesses in North Nashville, or more than 80% of the Negro owned and operated businesses in the entire county (Tr. 32, 250), and most of them are on Jefferson Street (Tr. 33, Plf. Exh. 8, p. 9). These businesses have capital assets of about $4,680,000 and an annual gross volume of business averaging $11,700,000 (Tr. 251). The undisputed evidence was that virtually all these Negro businesses will either be destroyed or seriously damaged by the proposed route and its accompanying arterial roads which will take the property occupied by many, and will disrupt those that remain by fragmenting and restricting their service areas and separating them from their customers (Tr. 33). Relocation will be impossible for many of the businesses because there is little other commercially zoned property in Negro areas and racial discrimination will bar them from white areas (Tr. 254-255). The testimony also showed that in other areas of the City the interstate highway plans had been designed to minimize or avoid damage to white-owned businesses (Tr. 27-28).[4]

Three Negro institutions of higher learning, Fisk University, Meharry Medical College and Tennessee A&I State

[4] In fact, petitioners' expert witness, a city planner, testified that the natural beneficiaries of the destruction of the Negro owned businesses will be white owned establishments north of the proposed route (Tr. 34).

University, having substantial capital plants and large enrollments (Tr. 202-03, 222-23, Plf. Exh. 28) will also be damaged by the highway plans. The interstate route will separate Tennessee A&I State University on the northwest from Fisk and Meharry on the northeast, isolating Tennessee A&I in a narrow strip between I-40 and the Cumberland River, and isolating Fisk and Meharry between I-40 and the industrial and downtown sector to the south (Tr. 30-31). Major arterial routes planned in connection with the interstate highway will further damage the institutions by separating Fisk and Meharry, and channeling heavy traffic through their campus areas (Plf. Exh. 26).[5] The highway will also damage a new neighborhood health center planned by Meharry Medical College by isolating the population it serves (Tr. 224). Fifty-one Negro churches in North Nashville would be detrimentally affected by the I-40 route: the property of two churches has been taken for the route and two others have been notified that their buildings will be taken (Tr. 232); the other 47 will be separated from 20 to 75 percent of their memberships (Tr. 234).

Whereas the effects of the highway program on Negro institutions were not considered, the effects of the program on white institutions were carefully appraised. As part of a reevaluation of its interstate highway program in Nashville, including the major arterials serving the interstate system, the state highway department undertook an extensive parking study of the City's white University Center (Vanderbilt University and Peabody and Scaritt Colleges) (Plf. Exh. No. 7). Moreover, the state highway department plans to coordinate its highway plans with several local urban renewal projects, relocate a state highway, and re-

[5] The State Department of Highways and the Metropolitan Government jointly planned major arterial routes and their relationship to the interstate highway program. (See plaintiffs exhibit No. 5.)

move all through traffic from the white University Center area (Plf. Exh. No. 5, pp. 10-11). It is planning to do so while planning at the same time to intensify traffic in the Negro university area.

Both courts below agreed that the damage to the Negro institutions of North Nashville had been amply demonstrated. The Court of Appeals wrote that:

> . . . the District Judge found that "[p]laintiffs have shown that the proposed route will have an adverse effect on the business life and educational institutions of the North Nashville community. The proof shows that the consideration given to the total impact of the link of I-40 on the North Nashville community was inadequate." He pointed out that the business section of Jefferson Street will be "gravely affected." This Court agrees with these conclusions. For example, it is shown that the blocking of other streets will result in a heavy increase in traffic through the campus of Fisk University and on the street between this university and Meharry Medical College. A public park used predominantly by Negroes will be destroyed. Many business establishments owned by Negroes will have to be relocated or closed (14a).

There was also substantial evidence to support the trial court finding (quoted above) that there was "inadequate" consideration of the adverse effect of the route on the community. Route I-40 was planned as a part of the interstate system of highways begun under the Federal-Aid Highway Act of 1956 (70 Stat. 385, Tit. 23 U.S.C. §§101 *et seq.*). Even before the 1956 law was passed, but in anticipation of it (Tr. 371), planning of the interstate roads within Nashville was begun by a city-county planning agency, which commissioned the engineering firm of Clarke and

Rapuano to undertake a study and propose routes (Plaintiffs Exhibits 35, 36). Except for the link now in question, the routes finally adopted, including the basic inner and outer loop plans, were substantially the same as those recommended in 1955 by Clarke and Rapuano (Compare Plaintiffs Exhibit 31 with Exhibits 35 and 36). But the Clarke and Rapuano recommendations for the road segment which would serve the function of the presently disputed segment were quite different from the plan subsequently adopted. Clarke and Rapuano's Memphis leg would have continued on a straight line following the shortest distance to the to the center of the city until it joined the inner loop (Plaintiffs Exhibit Nos. 35 and 36). This route would have produced none of the adverse effects on the North Nashville Negro community. It would not have affected the Negro businesses or the educational institutions in the manner of the present proposed route. The consulting engineer's report recommending the route stated that it was based on many factors, including a consideration of "the density of population", the "land use pattern", and "existing neigborhoods" (Plaintiffs Ex. Nos. 35 and 36). Shortly thereafter the 1956 Federal-Aid Highway Act placed initial responsibility for determining interstate system highway routes in the hands of state highway departments (23 U.S.C. §106). The Tennessee highway department approved the present route plan in 1957, after consultations with the Nashville planning agency, federal officials, and the Clarke and Rapuano firm which was also hired by the state highway department in a consulting role. It has never been explained why the original Clarke and Rapuano route for the Memphis leg connecting with the inner loop was abandoned. In place of the straight line into the center of the city originally proposed, there was substituted the present route which veers off into the Negro community.

At the trial in this case, a high state highway official at first denied knowledge of the existence of the original Clarke and Rapuano route (Tr. 372-373), and admitted it only when confronted with the maps and minutes of three meetings he attended to discuss the route.[6] No state official offered any explanation for abandoning the original route and substituting the new route. Petitioners' expert witness (Mr. Yale Rabin, a city planner) examined the files of the Metropolitan planning agency (which participated in all stages of the planning of the highway) and found no documents explaining the change (Tr. 486). Despite persistent questioning, Mr. Leon Cantrell, the highway location engineer, never really said why the route was changed to go through the Negro community. First he said that the reasons for the change would "take me a week to tell you" (Tr. 385). When pressed for specifics he said that "all of our studies pointed to the fact that it was the most sound thing that we could do towards making the improvement through the city" (Tr. 388). He finally said that he meant studies by the Planning and Research Department (Tr. 388-389). Counsel persisted and questioned the State Highway Department's planning and research director, Mr. Clarence Harmon, about the existence of such studies. Mr. Harmon admitted that his files contained no such studies about the economic impact of the present route on the North Nashville community. Mr. Harmon testified as follows:

> Q. Yes. Is there any information in your files at all with regard to the—any economic studies made by the State Department of Highways, State Highway Department, with regard to the North Nashville area?
> A. Not that I can recall at this time, Mr. Williams (Tr. 466-467).

[6] Plaintiffs exhibit No. 34 is a record of records on July 11, July 12 and July 13, 1955.

At one point in his testimony, Mr. Harmon indicated such studies might exist, but he quickly retracted that testimony when asked to produce the volumes:

> Q. Will you bring them down after lunch and could you at lunchtime pinpoint the data which show—which shows the economic impact— A. (Interposing) No. There is none that shows economic impact.
>
> Q. All right, sir. Then, there is no data that reflects the economic impact of the location of this highway on the Negro community in North Nashville, is there? A. No, sir. That's right. There isn't (Tr. 471).

The Tennessee State Highway Department held a public hearing on the proposed interstate system for Nashville at 9:30 a.m. on May 15, 1957 (Plaintiffs' Ex. No. 1). There have been no public hearings on these roads in the succeeding ten years. The court below held that the notice of the hearing, by posting in several post offices and delivering copies to the Mayor and County Judge was "unsatisfactory . . . especially when for some unexplained reason the notice announced the hearing for May 14, and it actually was held the following day, on May 15" (10a). There were no notices at all posted in the Negro sections of town (9a). The largest local newspaper carried no mention of the hearing and three reporters (one of whom is now city editor of the *Nashville Tennessean*) who covered the highway story at the time and wrote numerous articles about the highway testified that they did not know or write anything about the hearing (Tr. 128, 137, 143). The hearing was recorded by a tape recorder and later transcribed. The court below said that the hearing manuscript:

> . . . leaves much to be desired as a manuscript of a public hearing, since the recording device failed to pick up many questions from the audience. The manuscript contains only the statements and answers

of the Commissioner and other representatives of the highway department and what was said from the platform where the microphones were located (10a).

There was no discussion during the hearing of the impact of the road on the North Nashville community. Since the transcript contains no names of private citizens who asked questions, none could be called as witnesses to explain what occurred at the hearing, or what did not occur. The District Court "assumed" that petitioners had made out a prima facie case of lack of proper notice as the colloquy quoted in the margin indicates.[7]

Two days after the hearing, on May 17, 1957, an attorney for the highway department signed a certificate which he attached to the hearing transcript stating that he had read the transcript, and that the highway department had considered the economic effects of the location of the project and was of the opinion the project was properly located. Subsequently, in 1958, federal officials approved the plan and authorized the expenditure of federal funds to acquire land in the area now in question (Tr. 418). However, not until 1965 and 1966 did the state highway department move to acquire land in the area (Tr. 419, 421), and not until 1967 did the board take the final steps leading toward awarding a construction contract (Tr. 438).

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[7] Mr. Williams: Well, Your Honor, if Your Honor pleases, I have a whole lot more. I have some additional witnesses on this question of notice.

The Court: Well, I'm not interested in any further ones on the question of notice. I tell you quite frankly, Mr. Williams, as far as I can tell about the law on this notice thing that that raises a question between the Federal Government and State as to paying the money. That seems to be the way the cases have been decided and have nothing to do with anything further.

So, let's just assume that you have established by certain proof subject to their coming in if they want to offer something else, you have made out a prima facie case on that for whatever value it may have (Tr. 145).

Throughout the decade from 1957 to 1967 Negro citizens of North Nashville from time to time protested the plan to various officials. (Tr. 118-119, 151-158, 180, 258, 265, 267-268, 286-287, 315-316). From 1957 to 1967 every protest and every inquiry was met with official statements by city as well as highway department officers that the highway plans were "preliminary," were "not final," and were "subject to change," and that the exact location of the road was still uncertain. At least seven plaintiffs' witnesses testified to such responses to their inquiries; the seven included two Negro councilmen representing the affected areas (Harold Love and John Driver) (Tr. 112-113, 118, 294-295), three civic organization leaders (Mrs. Blackman, Mrs. Caruthers and Mrs. Fuson) (Tr. 169, 184-185, 312), a businessman (Mr. Otey) (Tr. 258, 285), and a Fisk University faculty member (Mr. Vaughn) (Tr. 306-307). None of them were able to discover the precise route of I-40 through North Nashville, although among them they talked with and heard speeches by officials in both the city and state agencies involved in the highway planning.

Mr. Leon Cantrell, an engineer for the Tennessee highway department for more than 45 years, described the route selection process. He said that first the engineer establishes "a corridor through which to make some studies" (Tr. 390). Then a "preliminary location or preliminary line is projected. That doesn't necessarily mean that is where it is going to be" (Tr. 391). Eventually the line is finalized. He said, "You don't get the line tied down until just about the time it is ready to let the contract. If you tie it down more quickly than that, you will be ill-advised" (Tr. 391). Cantrell said that the 1957 plans were corridor locations (including, specifically, the maps published in newspapers at that time (Tr. 396-397)) and that a "corridor could be from five hundred feet to a mile wide" (Tr. 372-

373), although normally in an urban area it would be "within several blocks" (Tr. 398).

The highway department's right of way acquisition engineer, J. K. Bilbrey, testified that the state got authority to acquire real estate along the route from 35th Avenue to 18th Avenue on July 15, 1958 (Tr. 419). But acquisition of the bulk of the parcels did not begin until October 15, 1965 (Tr. 420). Similarly, with respect to the segment from 18th Avenue to the Cumberland River, acquisition was authorized in September 1958, but except for a few parcels acquisition did not begin until May 13, 1966 (Tr. 420-421).

Mr. Bilbrey testified that in an area from 48th Avenue to the River (an area larger than, but including the disputed segment) all but 90 of 1,100 parcels had been acquired by the State, at an overall cost between nine and ten million dollars (Tr. 412-413). Many of the business properties along Jefferson Street still stand and are in operation although some demolition work has begun (Tr. 426). Some residential property already acquired by the City is also still occupied (for example, see. Tr. 193).

This lawsuit was filed October 26, 1967, when the highway department announced imminent plans to let a construction contract for the road segment. The plaintiffs had been unsuccessful in efforts to persuade the federal and local authorities to postpone letting contracts for a 90 day period of further study and negotiation (Tr. 155-158). They were unable to get such a delay notwithstanding a unanimous resolution of the Nashville and Davidson County Metropolitan Council supporting their request (Tr. 296, Plaintiffs Ex. 33).

REASONS FOR GRANTING THE WRIT

I.

Introduction.

The crisis of the cities is compounded of many elements. This case is of great importance for it affords the opportunity of applying the rule of law and the Constitution to some of them. In particular, the case involves the impact which the vast federal highway program has had on urban areas and legal rules which would regulate that program's impact on minority communities.

Homer Bigart of the *New York Times* recently has written that the federal road building program has compounded the "misery of the dispossessed:"

> The program has sent great rivers of concrete creeping like lava through residential neighborhoods and commercial areas, dislocating families, schools, churches and businesses. Parks have been torn up, historic sites engulfed. Because the slums afford the easiest and cheapest corridors, it was the ghetto families that were most often uprooted.
>
> Whenever the slums were black, the misery of the dispossessed was compounded. Imprisoned in the core city by de facto housing segregation, the dispossessed Negroes were usually unable to obtain other dwellings except at much higher rent. This was a contributing factor to the racial tensions that exploded in last summer's riots. (*New York Times,* No-

vember 13, 1967, Late City Edition, page 1, "U. S. Road Plans Periled by Rising Urban Hostility.")[8]

It is estimated that 146,950 households will be displaced by federally aided highway construction in the three year period from July 1, 1967, to June 30, 1970. Similarly, 16,679 businesses and non-profit organizations will be displaced. The vast majority are in urban centers.[9] A Senate committee began hearings to consider the problem of urban highway location on November 14, 1967. (Senate Subcommittee on Public Roads, Hearings to Review Policies Relating to Urban Highway Planning Design and Location).

Professor Charles A. Reich has written vividly about suburban housewives, elderly widows, men in business suits and off-duty policemen attempting to bar the way of bulldozers about to wreck historic homes and cut down age old trees to push interstate highways forward. Reich, *The Law of the Planned Society,* 75 YALE L. J. 1227 (1966). Professor Reich observes that:

> . . . it seems increasingly difficult for the citizen to make effective contact with government. Citizens are rarely informed when the agency makes its decision; their first notice is often the roar of a bulldozer.

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[8] More recently, the same newspaper reported:

> . . . in a surprisingly large number of other American cities [i.e., other than Washington, D. C.]—New York, Philadelphia, Baltimore, Chicago, Cleveland, St. Louis, New Orleans, Nashville, San Francisco and Seattle—the angry cries of similar neighborhood groups have helped bring the bulldozers to a halt or diverted them. As a result, a vast re-thinking of highway concepts is underway at top government levels. (*New York Times,* December 31, 1967, page E-7, "White Roads Through Black Bedrooms.")

[9] House Committee on Public Works, 90th Cong., 1st Sess., Highway Relocation Assistance Study (transmitted by Secretary of Transportation to Congress) (Comm. Print No. 9, July 1967).

> Even when notice is available many agencies have no regular procedures for hearing citizens' protests. Nor are agencies easily controlled through elections; . . . . Nor does there appear to be much hope of relief from the law and the courts. . . . the courts almost uniformly refuse to interfere. Lawyers who practice before government agencies and students of administrative law are often as baffled as local demonstrators (*id.* at 1229).

Rules of law exist—as this petition demonstrates—to deal with these issues regularly and according to standards. This petition asks that those rules be applied. In the instant case, both courts below went to unusual lengths to express a sense of agreement with petitioners' position. Judge Gray expressed grave doubts about the "wisdom of the selection" of the I-40 route (3a). The Court of Appeals "regretted" that petitioners' requests for delay and more study were not granted (14a) and speculated that "there yet may be hope that some of the severe damage to the Negro community and institutions can be reduced if not relieved in their entirety" in view of reported statements of federal officials about conducting further studies (15a). But both courts deferred to the wisdom of the highway engineers—("The routing of highways is the *prerogative* of the executive department of government, not the judiciary" (12a; emphasis added)—and denied relief. Fundamentally, the courts below did not acknowledge the function of law and the Constitution as relevant to petitioners' problem. With respect, the root fallacy of the lower courts' view of this case is encapsulated in the quoted sentence. All powers of every department of government, whether concerning highways or anything else, must be exercised in conformity with the Constitution and laws.

The word "prerogative," with its unfortunate history, cannot carve out an exception.

Petitioners submit that the courts of the United States have a role defined by law in such controversies, where, as here, state officials have, by any reasonable appraisal, plainly engaged in racial discrimination in violation of the Fourteenth Amendment and have failed to conform to requirements laid down by the Congress for the protection of citizens in petitioners' situation.

This case should be reviewed despite its non-final status because there are "important and clear cut issue[s] of law fundamental to the further conduct of the case . . . [which] would otherwise qualify as a basis for certiorari." Stern and Gressman, Supreme Court Practice, 3rd Ed., pp. 148-149, citing *United States* v. *General Motors Corp.*, 323 U.S. 373, 377; *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3. Any appraisal of the exercise by the District Court of its equitable discretion must take into account the lower court's erroneous view of the law. It is by no means clear that the trial court would have exercised "discretion" to deny all relief if the court had understood the law and the Constitution to be as petitioners urge. In any event, the trial court had no "discretion" to refuse to redress a plain violation of the Constitution.

If review here is denied, the damage which petitioners seek to avoid will in all likelihood be completed before litigation on an application for final injunction is concluded.

II.

The Highway Route Is Racially Discriminatory in Violation of the Fourteenth Amendment.

If respondents had expressly provided that this span of I-40 "be so located as to injure as much Negro business and other property, and as little white property as possible," no court would hesitate to strike it down. Petitioners' proof, accepted by both courts below, showed a close approximation, in effect, to the route that would have been followed had the quoted directive been in force. The courts below erred by applying an erroneous requirement that petitioners, in addition to this practical equivalence, prove a racially discriminatory "motive" or "intent" where they plainly established the racially discriminatory effect of the highway routing. They proved, and the courts below acknowledged that they proved, that the highway link substantially harmed Negroes. It is uncontradicted that the interstate highway plan visits no such harm on white communities, businesses, churches and educational complexes. There was uncontradicted evidence of affirmative efforts made by the highway planners to avoid such damage to whites. Moreover, a practical alternative route portending no harmful effects for Negroes was available, was first recommended by engineering consultants, and was cast aside for no recorded or explained reason. None of the state highway planners offered any reason to justify the route chosen, or any explanation for the decision to visit such incalculable harm on the Negro community. Can such an overwhelming case of racial discrimination escape condemnation because the state officials have not confessed a racial motivation?

No such proof of motivation has been found necessary in several classic cases of racial discrimination in this Court,

Yick Wo v. *Hopkins,* 118 U.S. 356; *Guinn* v. *United States,* 238 U.S. 347; and *Gomillion* v. *Lightfoot,* 364 U.S. 339. Yick Wo, who had a wooden laundry building, was convicted under a law forbidding the operation of laundries without official permission, except in brick or stone buildings. In the city there were 320 laundries, 310 of them were wooden, and 240 were operated by Chinese persons. Yick Wo and 200 of his Chinese countrymen were denied permission to maintain laundries. He and 150 Chinese persons were arrested under the law and the 80 laundry operators who were not Chinese were left unmolested. The discrimination was condemned because there was "practically . . . unjust and illegal discrimination between persons in similar circumstances" (118 U.S. at 374). The effect was to discriminate against Chinese laundry operators, and that was enough without proof of hostile motivation.

Similarly, the discriminatory effect of the "grandfather clause" condemned in the *Guinn* case, *supra,* was sufficient to settle the matter. The government did not prove the motive of the legislators; it won by showing that the practical effect of the laws was to prevent Negroes from voting. And in *Gomillion* v. *Lightfoot, supra,* where the interest of Negroes was unmistakably attacked without their ever being named, the Court found the conclusion of discrimination irresistible from factual allegations simply describing the effect of the challenged law on Negroes, e.g., excluding them all, and not excluding whites, from Tuskegee.

We believe the discrimination showing in the instant case is as plain as in *Yick Wo, Guinn* and *Gomillion.*

It is plain that Negroes have been treated in a manner extremely detrimental to their interests, that the burden falls upon them unequally, and that no justification for the imposition appears. Whether the cause is arbitrariness, in-

difference or deliberate hostility, the result of unequal treatment is constitutionally prohibited, as "it is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725.

III.

There Was no Public Hearing With Proper Notice as Required by the Federal Highway Statute.

The Tennessee Highway Department failed to comply with the requirement established by the Congress in §116(c) of the Federal-Aid Highway Act of 1956 that a state highway department submitting a plan for a federal-aid highway project certify "that it has had public hearings, or has afforded opportunity for such hearings, and has considered the economic effects of such a location." Petitioners contended that the highway department failed to give any adequate notice of the hearing held on May 15, 1957. The district judge stated during the trial that he assumed petitioners had made a prima facie case on the notice question (see note 7, *supra*). The Court of Appeals expressly held that the Tennessee Highway Department used "an unsatisfactory way to give notice of a public hearing" (Appendix 10a).[10]

Both courts below rejected petitioners' arguments based on the hearing requirement but did so on different reasoning. Accordingly, we discuss first the District Court reasoning and then that of the Court of Appeals.

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[10] Compare the scanty notice in the present case with the elaborate efforts by another state highway department to give notice which are reported in *Linnecke* v. *Department of Highways*, 76 Nev. 26, 348 P.2d 235, 236-237 (1960) (notice by publication in newspaper, by extensive press coverage and by distribution of 30,000 pamphlets describing the freeway to utility users).

District Judge Gray stated in his oral findings and conclusions that:

> The court finds as a matter of fact that a hearing was held and holds that the questions of insufficiency of notice, inadequacy of the hearing, and of the transcript thereof are questions addressing themselves to the Bureau of Public Roads of the Department of Transportation (1a).[11]

But there is no warrant for the refusal of the court to implement the Congressional policy expressed in §116(c). The court's reasoning is bottomed on the absence of a state law requirement of a hearing and thus defeats the Congressional policy. The plain purpose of the Congress in enacting the public hearing requirement was to provide an opportunity for citizens and communities affected by the roads to have a voice before highway plans were presented by the States to the federal authorities for approval. This is the common sense interpretation of §116(c) and it is adequately supported by the legislative history. Section 116(c) of the Federal-Aid Highway Act of 1956, 70 Stat. 385, was enacted to broaden a pre-existing require-

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[11] Judge Gray cited and relied on three lower court decisions which had expressed the view that citizens could not complain about the failure of highway officials to afford a hearing. *Hoffman* v. *Stevens*, 177 F. Supp. 898, 903 (M.D. Pa. 1959); *Piekarski* v. *Smith*, 38 Del. Ch. 402, 147 A.2d 176 (1958), *aff'd* 153 A.2d 587 (Sup. Ct. Del. 1959); *Linnecke* v. *Department of Highways*, 76 Nev. 26, 348 P.2d 235 (1960). These courts reasoned that since state authorities under state law could condemn land for highways without conducting public hearings, a failure to comply with the federal statutory requirement of a public hearing was a matter which could be corrected only by the federal administrative officials withholding federal funding. The line of reasoning is exemplified by *Hoffman* v. *Stevens* where the court said: "Under Pennsylvania law and policy, absent federal aid, such hearings are not required or held. At best, failure to afford a hearing might give rise to a dispute between the Secretary of Commerce and the Pennsylvania Department of Highways as to the allocation and use of federal funds" (177 F. Supp. at 903).

ment which had been enacted in a 1950 highway act.[12] The legislative history of the 1950 provision requiring public hearings (§13 Federal-Aid Highway Act of 1950, 64 Stat. 791)[13] plainly demonstrates a purpose to insure "that the residents of the cities or towns are given the opportunity to express their views" on highway locations (S. Rep. No. 2044, 81st Cong., 2nd Sess., 8 (1950)). The debate on an amendment to delete the hearing provision in the Senate shows that the proponents of the bill wanted local citizens to have an opportunity to be heard in protest against the decisions of highway engineers. 96 Cong. Rec. 13005-13006 (1950), remarks of Senators Saltonstall, Chavez and Kerr.[14]

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[12] The Conference Committee Report on the 1956 act stated that "this provision continues and broadens the existing requirements in § 13 of the Federal-Aid Highway Act of 1950" (H.R. Rep. No. 2436, 84th Cong., 2nd Sess., 36 (1956).

[13] "Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of any city or town shall certify to the Commissioner of Public Roads that it has had public hearings and considered the economic effects of such location."

[14] The debate included the following exchange:

> Mr. Kerr: Is the effect of the language in the bill that the State highway department shall certify that they have given the folks affected an opportunity to have a hearing?
>
> Mr. Chavez: That is all that is asked. At least let them have a day in court.
>
> Mr. Kerr: Does that interfere with States' rights?
>
> Mr. Chavez: It gives States' rights.
>
> Mr. Kerr: Does it interfere with local rights?
>
> Mr. Chavez: It gives the local citizens rights.
>
> Mr. Kerr: Is the local right it gives them the right to be heard?
>
> Mr. Chavez: Yes; the right to be heard.
>
> Mr. Saltonstall: Mr. President, will the Senator from New Mexico yield?
>
> Mr. Chavez: I yield.
>
> Mr. Saltonstall: Let us assume that a State highway department has a certain fund of its own for use in its own bailiwick with regard to the location of a road. Would not the intrusion of

The hearing is supposed to give the citizen an opportunity to communicate with state and federal planners.[15] As the Bureau of Public Roads Policy and Procedure Memorandum 20-8 (Def. Exh. 2, para. 3-h) makes clear, the transcript of the public hearings are sent to the federal officials so that they may be satisfied that the State has considered the economic effects of the roads.[16] Petitioners were deprived of an opportunity to communicate their views to either the state or federal officials at the time the important decisions

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the Federal Government be in effect an interference with the State's rights?

Mr. Chavez: *No; we insist that the local people have a right to be heard.*

Mr. Kerr: The only thing that is required is that the officials certify that that have given the people a chance to be heard, is it not?

Mr. Chavez: We do not even ask that they agree with them, but they should be heard. Now they say, "We are going to change this highway," and the folks of the community have nothing to say about it. (96 Cong. Rec. 13006 (1950); emphasis added.)

[15] Increasingly, Congress and the Executive Branch provide for community participation in a variety of federal programs primarily affecting cities. See The United States Housing Act of 1949, 63 Stat. 416, 42 U.S.C. § 1455(c) (Public hearing before urban renewal). Regulations provide further protections for minority groups. U.S. Department of Housing and Urban Development, Urban Renewal Manual, § 10-1. See also, The Demonstration Cities and Metropolitan Development Act of 1966, 80 Stat. 1255, 42 U.S.C. § 3301 *et seq.*

[16] An amendment to Policy and Procedure Memorandum 20-8 issued June 16, 1959, contains a more complete statement of the purpose of public hearings:

> The objective of the public hearings is to provide an assured method whereby the State can furnish to the public information concerning the State's highway construction proposals, and to afford every interested resident of the area an opportunity to be heard on any proposed Federal-aid project for which a public hearing is to be held. At the same time the hearings afford the State an additional opportunity to receive information from local sources which would be of value to the State in making its final decision as to which of possibly several feasible detailed locations should be selected. (P.P.M. 20-8(1))

were made by the failure to hold a hearing with proper notice. In addition, the hearing was held many years before there was any actual move to construct the highway and the public had no reasonable way of keeping informed of the decision processes between the governmental agencies during the ten year period, 1957-1967. Thus, in this additional respect, the State Highway Department failed to hold a hearing affording a meaningful way for citizens to communicate their views to the decision makers.

The opinion of the Sixth Circuit states an additional ground for denying relief on the hearing question. This is that:

> . . . Although the notices were unsatisfactory, we are convinced that the District Judge would have been justified in concluding that no literate citizen of the Nashville community could have been unaware since 1957 of the proposed route of the interstate highway, including the approximate location of the section now under attack.

The court pointed to newspaper clippings, maps, public speeches and publicity about the proposed routes and the fact that some of the appellants knew the general area of the proposed route. We urge with deference that this treatment entirely misses the point. If there is a federal statutory requirement that citizens be given an opportunity to express their views in a public hearing, newspaper publicity about the proposed routes is no substitute for a hearing. Of course, newspaper publicity giving notice of the hearing would be a different matter, but there was none. It may be relevant with respect to other issues involved in the case (see part V *infra*) that the petitioners had an opportunity to know about the proposed routes from newspaper articles, but this cannot at all affect their right to have had a proper public hearing.

The respondents have argued that petitioners have no standing to object even if the highway department completely flouted the hearing requirement of §116(c). We submit that the Court of Appeals properly rejected this claim citing *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F.2d 608 (2nd Cir. 1965), where conservationists were allowed standing to contest orders of the Federal Power Commission although they asserted no economic interest. See *Office of Communication of United Church of Christ* v. *F.C.C.,* 359 F.2d 994 (D.C. Cir. 1966). And, of course, petitioners do have a demonstrable economic interest in view of the threatened destruction of businesses and harm to their universities. See also, *Road Review League* v. *Boyd,* 270 F. Supp. 650, 660-661 (S.D. N.Y. 1967).

IV.

There Was no Consideration of the Economic Effects of the Highway Route as Required by Federal Law.

Petitioners have contended in Part II, *supra,* that the Fourteenth Amendment makes unlawful the decision taken when the highway was routed so as to destroy or deeply to injure the Negro community of Nashville, as such, for the benefit of the remaining—that is to say, the white—segment. Petitioners contend here that, at a minimum, the Fourteenth Amendment requires that such an action not be taken without adequate consideration of its effects. "Equal protection of the laws", a concept applicable with special force in the field of race (see, e.g., Mr. Justice Harlan dissenting in *Harper* v. *State Board of Elections,* 383 U.S. 663, 682, n. 3), ought to require at the least that protection which comes from fair and enlightened delib-

eration. No less, it would seem, ought to be held required by the due process clause, occurring as it does in an amendment which, again, specifically thrusts in the direction of racial discrimination and injury. The lower courts have found and the record amply shows that such deliberation was, if not entirely lacking, present in such minimal amount as to be "inadequate." "Inadequate" consideration of the claim of a Negro community not to be wiped out is doubly "inadequate" to the Fourteenth Amendment.

Closely connected is the failure of the respondents to follow the sense of the statutory requirement that it be certified that consideration has been given to the economic effects of highway routing. In the context of the present case this requirement ought to be held to compel consideration of racially discriminatory economic effects.

The Tennessee Highway Department failed to comply with the requirement of Section 116(c), *supra*, that the Department certify that it "has considered the economic effects of such a location" of a road. The trial judge found that the consideration of the economic effects of the route on the North Nashville community was "inadequate," and the Court of Appeals opinion quotes this finding and expressly states agreement with it (14a). But on this issue also the courts denied relief.

The trial court made no detailed findings on this question because it saw it as relating to the wisdom of the route, which the court said it was powerless to review. The Court of Appeals' opinion partly reflects this same view, expressing the necessity for judicial deference to "executive prerogative" as if it were a sovereign prerogative. Under §116(c) the courts below should have inquired whether the State Highway Department gave careful consideration to the economic effects of their plan as Congress commanded. In *Scenic Hudson Preservation Conference* v. *Federal Pow-*

er Commission, 354 F.2d 608 (2nd Cir. 1965), cert. den. 384 U.S. 941, the Court reviewed Commission action approving a proposal to build a power facility notwithstanding conservationists' objections. The landmark decision returned the case to the Commission for a new hearing saying that the record on which the Commission decided the issue was incomplete, that the Commission ignored relevant factors and failed to make a thorough study of possible alternatives. The Court said, "While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission's decisions receive that careful consideration which the statute contemplates" (354 F.2d at 612). Analogous reasoning should govern the instant case. The requirement of section 116(c) cannot reasonably be deemed satisfied by "inadequate consideration" of the economic effects of a road as was found in this case. The Congressional scheme for the roads program is subverted rather than supported by the failure of the courts to inquire whether the state highway departments are carefully considering the economic effects of highway routes. This is an important policy of the Congress expressed in the very section of the basic law containing the declarations of Congressional interest about accelerating the interstate highway system and speeding its completion[17] and also a Congressional policy of encouraging and developing small businesses.[18] The decision below defers to the engineers. Congress was concerned with protecting the citizens from some of the highway engineers. Opposing a move to delete the public hearing requirement from the highway law, Senator Chavez said:

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[17] See Sections 116(a) and 116(b) of the Federal-Aid Highway Act of 1956, 70 Stat. 385.

[18] Section 116(d) of the Federal-Aid Highway Act of 1956, 70 Stat. 386, now codified as 23 U.S.C. § 304.

> Little towns and villages are being ruined because every 2 or 3 years an engineer has an idea that the automobiles going to the next town should be able to reach it 5 minutes sooner. We should consider the economy of the folks living along the highway. (96 Cong. Rec. 13006 (1950)).

Several relevant recent Congressional enactments demonstrate the view of Congress—consonant with the *Scenic Hudson* decision—that highway planners must consider alternative plans so as to minimize the harm inflicted upon the variety of interests affected by highway construction. Such provisions were contained in Section 15 of the Federal-Aid Highway Act of 1966, 80 Stat. 766, 771, 23 U.S.C. §138 (Preservation of parklands), and in the Department of Transportation Act, sections 2(a) and 4(f); 80 Stat. 931. 934, 49 U.S.C. §§1651(a), 1653(f). The last mentioned provision states:

> (f) . . . After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

Indeed, two significant state court decisions recognize the necessity of judicial scrutiny over plainly arbitrary actions which disregard alternative methods of minimizing harm. In *State Highway Commission* v. *Danielsen*, 146 Mont. 539, 409 P.2d 443 (1965), a planned highway route was enjoined. In *Texas East Trans. Corp.* v. *Wildlife Preserves, Inc.*, 48 N.J. 261, 225 A.2d 130 (1966), a case in-

volving an underground gas transmission pipeline, the court held:

> Existence of an alternate route for a pipeline which will reasonably serve the utility's purpose, and which if utilized will avoid visiting on the condemnee's land the significantly disproportionate damage which the originally intended route would cause, is a matter which rationally relates to the issue of arbitrariness. . . . That a court has no authority to command the alternative does not mean that it cannot reject the original proposal. 235 A.2d at 137.[19]

Implicit in the §116(c) requirement that the economic effects of highway location be considered is the requirement that state highway departments act non-arbitrarily and consider alternatives to routes which will cause disproportionate harm to portions of communities affected by highway planning.

The Court of Appeals opinion seeks to avoid these arguments by pointing out that the Commissioner of Highways announced that the purpose of the public hearing held May 15, 1957, was to hear statements concerning the economic effects of the route, and that the attorney for the department signed a certificate that the department had considered the economic effects. The court said that the District Court had no practical way of determining to what extent the highway offiials considered the economic effects, and that it was proper to rely on a presumption of regularity of the public records—the certificate—and of compliance by public officers with their statutory duties.

This view might be reasonable if the record was merely silent on whether the economic effects were considered.

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[19] See also, *City of Pittsburgh* v. *F.P.C.*, 237 F.2d 791 (D.C. Cir. 1956).

But this record establishes the negative proposition. It shows, by testimony out of the mouths of the respondents, that the economic effects were not considered. The Director of Research and Planning for the Highway Department testified that no studies appraising the economic effects of the route through the North Nashville community existed in the files of the department (Tr. 466-467, 471). To be sure, the former commissioner did, as the opinion below says, point to exhaustive studies of the highway proposals by a reputable firm. But these Clarke and Rapuano studies (Plf. Exhs. 35, 36) recommended a route which did not pass through the Negro neighborhood and would have had none of the disastrous effects on the Negro community that the route finally approved will have. Thus, the commissioner said that he relied on his expert engineers to locate the route; the location engineer Cantrell said he relied on the Department of Research and Planning; the head of that department said there were no studies in the files; and the outside consulting firm's report reflecting a conservation of community values, recommended an alternate route not passing through the Negro ghetto. Additionally, the 1957 public hearing transcript (Plf. Exh. 1) contains not the slightest mention of the impact of the route on the North Nashville business districts, churches, or universities. Thus, the presumption that the certificate was true and of compliance by officials with their statutory duties was plainly rebutted by the officials and their records.[20]

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[20] Professor Wigmore says that the presumption of due performance of official duty "is more often mentioned than enforced; and its scope as a real presumption is indefinite and hardly capable of reduction to rules" (9 Wigmore on Evidence, 3d Ed., § 2534, p. 488). Wigmore also rejects the notion that a certificate could be deemed conclusive as against testimony on oath. "In many other instances the suggestion has been made that an official certificate should be taken as a conclusive testimony to the facts certified but this suggestion has been almost invariably repudiated by the courts" (4 Wigmore on Evidence, 3d Ed., § 1352, p. 708).

We pray that the Court grant review to redress a severe wrong to petitioners, to implement a plain Congressional policy, and to guide the lower courts in finding their proper role with respect to one important aspect of the crisis[21] situation facing urban Americans.

V.

The Balance of Equities Favors Petitioners.

In this concluding section we discuss briefly several "equity issues" which might be regarded as relevant to a decision of the case. None of these "equity issues" were very clearly relied upon by the trial court as a ground of decision. However, some have been raised by the respondents and others were mentioned by the Court of Appeals.

First, the respondents have raised the defense of laches. They rely upon the fact that during the past two years the State has acquired title to all but a few of the parcels of land along the projected route of the highway. The District Court opinion did not really decide whether, under all the circumstances, petitioners had exercised reasonable diligence in bringing their case to court. The court stated merely that:

> Their failure to initiate a substantial protest against the route of this highway until very recently can not be explained except by the assumption that the impact of the location was not realized until that time.

This somewhat unclear finding is entirely consistent with petitioners' testimony that they were unable to learn until recently the precise location of the road and that their

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[21] Congress has found and declared "that improving the quality of urban life is the most critical domestic problem facing the United States." Section 101 of the Demonstration Cities and Metropolitan Development Act of 1966, 80 Stat. 1255, 42 U.S.C. §3301 et seq.

many inquiries produced only vague and indefinite explanations of the governmental plans along with continuing disarming reassurances that plans were not yet final. The highway location engineer testified that the route was a "corridor plan" and then a "preliminary plan" until very recently since it was not the practice to finalize highway plans until just before construction contracts are awarded. There is no evidence that petitioners had any notice of what was going on during the multi-stage processes by which the highway department moved to begin the highway over the period of a decade following the public hearing.

Petitioners did bring suit before the highway department obligated itself by contract to construct the road. Thus, no third party's contract rights are at stake. There is no evidence that petitioners were able to determine the harmful consequences of the proposed route until the final plans were approved in the fall of 1967, shortly before they filed suit. The general route of the road was published in a newspaper in 1957, but most of the harmful consequences were the result of subsequent decisions made without notice to the public. For example, the decisions that will insure destruction of the business section of Jefferson Street are the decisions to build the I-40 route just north of Jefferson Street (taking the back of the business properties) and *also* to widen Jefferson Street as an arterial road (taking the front of these businesses). This type of detail, which vitally affects the situation, was not known by petitioners for any appreciable period of time before suit was filed. It is not fair to say that petitioners "slept on their rights" so as to be barred from equitable relief.

Despite the land acquisitions by the State, some forms of relief can still effectively prevent some harm which is

yet to be visited upon the petitioners' community. The business section on Jefferson Street has not yet been demolished and some businesses are still functioning. The court below points out that perhaps some of the worst damage may still be averted by "engineering." If constitutional rights have been invaded, an equity court should prevent any injury which can still be prevented.

There has been no attempt by the District Court to balance the equities by adjudging the losses that might be sustained if the project is now required to be changed. Petitioners' expert witness, a city planner, testified without contradiction that "a great many things . . . can be done" with the land other than using it as a road. He pointed out the land could be redeveloped under an urban renewal plan and that there was adequate precedent for the federal government to underwrite the expenses already incurred so that the funds need not be considered a loss. He also pointed out that the land might be resold for purposes beneficial to the community in accord with a plan to be prepared by the Metropolitan Planning Commission, or used in a comprehensive neighborhood renewal plan to provide a more adequate shopping center and more adequate parking facilities and services (Tr. 489-490).

It is necessary to strike a balance between the potential financial losses to the State and to the petitioners. The small businessmen in North Nashville and the universities there have large economic interests at stake and face irretrievable losses if the road goes through.

Unless injunctive relief is granted *pendente lite,* the damage to petitioners will become irreparable. The Court of Appeals granted a stay injunction pending appeal because the threatened injury to petitioners is so serious and the harm which a brief delay, necessary to finally decide

the case, might cause to the State is so tenuous. After all, the highway has already been delayed by respondents' own choice for 10 years since it was first planned. A few months further delay to allow the courts to function is plainly justifiable.

We submit that this case is appropriate for review on certiorari for the Court to decide the important issues of law presented.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Oral Findings of Fact and Conclusions of Law of District Court

Wednesday, November 1st, 1967

District Court of the United States at Nashville, Tenn.

The Court: Now, the first question before the court is presented by the motion to dismiss the action as against Mayor Beverly Briley of Metropolitan Nashville and Davidson County.

The only issue here is whether the mayor has the power from a legal standpoint to determine the location of interstate highways in Davidson County. The Court finds that he does not have such authority and accordingly the court holds that he is not a proper defendant and the action is dismissed as to him.

Now, the injunctive power of this court as it applies to public officials such as the governor of a state or the commissioner of highways is limited to the prohibition of acts which are unlawful, that is, not authorized by statute nor acts which are in deprivation of constitutional rights.

The first issue involves the hearing prescribed by the Section 116 (c) of Public Law 84-627 usually known as the Federal Aid Highway Act of 1956.

The court finds as a matter of fact that a hearing was held and holds that the questions of insufficiency of notice, inadequacy of the hearing and of the transcript thereof are questions addressing themselves to the Bureau of Public Roads of the Department of Transportation.

See Hoffman v. Stevens, 177 Fed. Supp. 893.

Also compare Parkarski v. Smith, 38 Del. Chancery 402.

And Lenecki v. Department of Highways, 76 Nevada, Page 26.

The proof adduced does not establish that the proposed letting of a construction contract is an unlawful act as a result of the shown irregularities relative to the hearing.

Oral Findings of Fact and Conclusions of Law of District Court

The final issue raised by this action is whether the selection of the route in question was made in such an arbitrary manner or with the purpose of discriminating against a racial or socio-economic segment of the population in the affected area so as to affect the legality of the selection.

If this were shown by competent proof the power of this court to review the legality of the decision in light of plaintiffs' constitutionally protected rights would be properly invoked. I do not find that that is the case.

Most of the evidence presented by the plaintiffs goes to the wisdom and not to the legality of the highway department's decision. Plaintiffs have shown that the proposed route will have an adverse effect on the business life and educational institutions of the North Nashville community.

The proof shows that the consideration given to the total impact of the link on the North Nashville community was inadequate. However, inadequate consideration does not constitute proof of a deliberate purpose to discriminate against the residents of North Nashville on the basis of race or socio-economic conditions.

Consequently, plaintiffs have not shown that the selection of this route for I-40 amounts to a denial of due process or equal protection of the laws.

The approximate location of the highway section in question was determined early in 1957. Plaintiffs' Exhibit No. 6, a copy of Nashville Tennessean article of May 5, 1957 contains a reproduction of the proposed section together with remainder of the interstate section to be located in Davidson County.

Insofar as this section is concerned although there may have been minor changes thereafter, the socio-economic effect now complained of would have resulted if no changes

had been made. The business section of Jefferson Street would obviously have been gravely affected and Meharry Medical College and Fisk University would have been separated from Tennessee State University.

Acquisition of rights of way has been under way for more than two years and substantially all of the rights of way have been acquired.

The plaintiffs in this action are as stated in the trial memorandum submitted by them herein "businessmen, teachers, ministers, councilmen, civic and professional leaders and other citizens residing and/or working and/or owning property or having other interests in the North Nashville Community."

Their failure to initiate a substantial protest against the route of this highway until very recently can not be explained except by the assumption that the impact of the location was not realized until that time.

In spite of the grave doubts the court has as to the wisdom of the selection made, based on the evidence which I have heard I can not find that an adequate basis has been laid for the use of the injunctive power of this court.

Accordingly the application for a preliminary injunction is denied.

Now, what I have just stated will constitute the court's finding of facts and conclusions of law on this application for a preliminary injunction.

* * * * *

Opinion of Court of Appeals
No. 18288

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NASHVILLE I-40 STEERING COMMITTEE, ETC., ET AL.,
Plaintiffs-Appellants,
v.
BUFORD ELLINGTON, GOVERNOR, ET AL.,
Defendants-Appellees.

APPEAL from United States District Court for the Middle District of Tennessee, Nashville Division.

Decided December 18, 1967.

Before: PHILLIPS, PECK and COMBS, Circuit Judges.

PER CURIAM. This is an appeal pursuant to 28 U.S.C. § 1292 (a)(1) from the order of the District Court denying a preliminary injunction to restrain officials of the State of Tennessee from constructing a section of Interstate Highway I-40 along its planned route in North Nashville, which is a predominantly Negro area of Nashville, Tennessee. The section of the proposed highway under attack is approximately 3.6 miles long and is a link in a highway extending from Memphis in West Tennessee through and beyond Ashville, North Carolina.

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331(a) and 1343(3) and 42 U.S.C. §§ 1981, 1982, 1983 and 2000d. Redress is sought for an alleged deprivation of rights under the Fifth Amendment and the due process and equal protection clauses of the Fourteenth Amendment.

Appellants are members of an unincorporated association of some thirty Negro and white businessmen, teachers, ministers, civic and professional leaders, and residents of North Nashville.

They sue on behalf of themselves as individuals, in the name of their association, and on behalf of the community they represent. The named appellants include faculty members of four Nashville universities and colleges, including Fisk University, Meharry Medical College, Scarritt College and Vanderbilt University.

The defendants in the District Court were Buford Ellington, Governor of Tennessee, Charles W. Speight, Commissioner of Highways of the State of Tennessee, and Beverly Briley, Mayor of the Metropolitan Government of Nashville and Davidson County, Tennessee. The District Court dismissed the action as to Mayor Briley.

The complaint charges that construction of the highway segment as planned will cause substantial damage to the North Nashville community, erecting a physical barrier between this predominantly Negro area and other parts of Nashville.

Two basic issues are raised by the complaint:

(1) That State officials failed to hold a public hearing with proper notice and failed to consider the economic effects of the proposed route as required by Section 116(c) of the Federal-Aid Highway Act of 1956, and the rules and regulations of the United States Department of Transportation (then the Bureau of Public Roads); and (2) that the selection of the route in question was made arbitrarily or with the purpose of discriminating against the Negro or low socio-economic segments of Nashville's population so as to damage and in part destroy the Negro business community of Nashville, injure predominantly Negro educational institutions, and impose other irreparable harm upon the North Nashville community.

The complaint avers that appellants first requested a delay of ninety days in the invitation for bids and that this delay was denied both by the Tennessee Commissioner of Highways and the United States Department of Transportation. This suit was filed October 26, 1967, after advertisement for bids had been made. Bids were scheduled to be received October 31, 1967.

District Judge Frank Gray, Jr. refused to issue a temporary

restraining order but promptly began a hearing on the application for preliminary injunction. This hearing was started Monday, October 30, 1967, and continued through Wednesday, November 1. In the meantime bids were received as scheduled, but State officials agreed not to let the contract, pending the order of the District Court on the application for preliminary injunction.

After the hearing, the record of which encompasses 538 typewritten pages of evidence and numerous and voluminous exhibits, the District Judge filed a memorandum opinion on November 2, 1967, resolving both issues of fact against plaintiffs, holding:

(1) That a public hearing, in conformity with § 116(c) of the Federal-Aid Highway Act of 1956, was held by State Highway officials; and

(2) That "[m]ost of the evidence presented by plaintiffs goes to the wisdom and not to the legality of the highway department's decision;" that acquisition of rights of way has been under way for more than two years and substantially all the rights of way have been acquired; that plaintiffs have not shown that the selection of the proposed route amounts to a denial of due process of law or equal protection of the law; and that no adequate basis has been laid for the use of the injunctive power of the Court.

In addition to denying the application for preliminary injunction, the District Judge overruled a motion for injunction pending appeal.

This Court entered a stay order requiring that the status quo be maintained and directing that the contract not be let pending our hearing. At the time this appeal was filed the docket for the Court's December session had been scheduled. Because of the great public interest involved, this case was advanced on the docket and specially set for argument during the December session.

Appellees urge that appellants have no standing to maintain this action. We reject this contention. *Scenic Hudson Preser-*

vation Conference v. *Federal Power Commission*, 354 F.2d 608 (2d Cir.), cert. denied, 384 U.S. 941. Appellees further contend that this case cannot be maintained as a class action. The District Court has not yet passed upon this issue, and it is not before this Court for consideration.

1) Scope of review

First we consider the scope of review in an appeal under 28 U.S.C. § 1292(a)(1) from the action of a District Court in denying a preliminary injunction. This statute confers the right of appeal to the Court of Appeals from an interlocutory order of a District Court refusing to grant an injunction.

In *American Federation of Musicians* v. *Stein*, 213 F.2d 679, 683 (6th Cir.), cert. denied, 348 U.S. 873, this Court approved the following statement:

> "The granting or denial of a temporary injunction pending final hearing is within the sound judicial discretion of the trial court, and upon appeal an order granting such an injunction will not be disturbed unless contrary to some rule of equity or the result of an improvident exercise of judicial discretion."

The rule is stated as follows in 7 J. Moore, Federal Practice, ¶ 65.04[2], at 1630-31 (2d ed. 1966):

> "A motion for an injunction pendente lite is addressed to the judicial discretion of the district court. While the grant or denial may raise only an issue of law and be reviewable as such, ordinarily discretion will be involved and when it is the test on appeal is not whether the appellate court in its discretion would have granted or denied the injunction, but whether the district court has abused its discretion. Accordingly, unless the district court has proceeded improperly, where discretionary action of the district court is involved, its action will not be lightly disturbed on appeal; . . ."

"Reversal on such an appeal can be only for abuse of discretion." 3 W. Barron & A. Holtzoff, § 1440 at 509, 510 (Wright's ed. 1958).

This rule has been followed and applied repeatedly by this and other Circuits. A few selected cases applying this rule are: *Hornback* v. *Brotherhood of Railroad Signalmen,* 346 F.2d 161 (6th Cir.); *Wooten* v. *Ohler,* 303 F.2d 759 (5th Cir.); *Progress Development Corp.* v. *Mitchell,* 286 F.2d 222, 229 (7th Cir.); and *Holzer* v. *United States,* 244 F.2d 562, 564 (8th Cir.). A recent decision in which the District Court refused to grant a preliminary injunction to restrain construction of a portion of interstate highway is *Road Review League, Town of Bedford* v. *Boyd,* 270 F. Supp. 650 (S.D. N.Y.).

Appellants rely upon *United States* v. *Beaty,* 288 F.2d 653 (6th Cir.), where this Court reversed the action of the District Court in refusing to grant a temporary injunction, holding that the District Court abused its discretion by refusing to apply applicable law under undisputed facts. We hold that this is not the situation in the present case.

2) Public Hearing

We next consider the question of whether the District Judge abused his discretion in refusing to grant a preliminary injunction on the ground that State officials failed to hold a public hearing with proper notice as required by the Federal-Aid Highway Act. The provision of the Federal-Aid Highway Act of 1956, § 116(c), 70 Stat. 385, relating to public hearings is set forth in the margin.[1]

[1] "(c) Public Hearings. — Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Commissioner of Public Roads that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location: *Provided,* That, if such hearings have been held, a copy of the transcript of said hearings shall be submitted to the Commissioner of Public Roads, together with the certification."
(This provision of the 1956 statute does not differ materially from the later statute which is codified at 23 U.S.C. § 128).

The record shows that a public hearing was held in the County Courthouse at Nashville on May 15, 1957, presided over by State Highway Commissioner William M. Leech, now a State Chancery Court Judge, who testified at some length in the District Court. Commissioner Leech opened the hearing with this comment:

> "Ladies and Gentlemen, this Hearing this morning has been called for the purpose of hearing statements complying with Section 116(c) of the Public Laws 627 of the 84th Congress, generally known as the Federal Highway Act of 1956, as it relates to the economic effect of the Interstate System in the city of Nashville and Davidson County, both inside and outside the city limits, comprising of an inner loop and an outer loop with five legs going out to be the fourth part of the entire Interstate System. This is the plan that has been developed by the consultant engineering firm of Clarke and Rapuano in connection with the Tennessee Highway Department and the Bureau of Public Roads. I think, here in Nashville, considerable publicity has been given to the planning and providing of this expressway system."

The evidence discloses that this hearing conducted in Nashville was similar to those conducted in all the other ninety-four counties of Tennessee.

The proof indicates that the hearing was well attended even though formal notice was given by supplying copies to the County Judge and Mayor and by posting copies in the main post office and five post office stations. These included the North Station Post Office at Sixth Avenue and Monroe Street which serves North Nashville, but is described as being located in a "white" neighborhood near the predominantly Negro community. Neither the statute nor the regulations of the Bureau of Public Roads prescribed how notice of hearings should be given.

We consider this to be an unsatisfactory way to give notice of a public hearing, especially when for some unexplained reason the notice announced the hearing for May 14, and it actually was held the following day, on May 15.

Based upon the record before us, however, although the notices were unsatisfactory, we are convinced that the District Judge would have been justified in concluding that no literate citizen of the Nashville community could have been unaware since 1957 of the proposed route of the interstate highway, including the approximate location of the section now under attack. The record contains copies of many newspaper clippings from 1957 forward, setting forth maps and descriptions of the proposed route. Judge Leech testified that he made many public speeches concerning the proposed system, including an address before a Negro civic group in North Nashville, and that there was much newspaper publicity concerning the proposed routes. Some of the appellants testified that they had known the general location of the proposed route through North Nashville long before the complaint in this action was filed.

The hearing was recorded and subsequently transcribed in manuscript form. A copy was filed with the then Commissioner of Public Roads. A copy of the manuscript was received as an exhibit in this proceeding. It leaves much to be desired as a manuscript of a public hearing, since the recording device failed to pick up many questions from the audience. The manuscript contains only the statements and answers of the Commissioner and other representatives of the highway department and what was said from the platform where the microphones were located.

Nevertheless, we cannot say that the District Court abused its discretion in denying a preliminary injunction on the ground that no public hearing was held in compliance with at least the minimum requirements of Section 116(c) of the Federal-Aid Highway Act of 1956 (footnote 1) and that appellants were not deprived of any constitutional rights by this

procedure. Cf. *Futch* v. *Greer*, 353 S.W.2d 896 (Tex. Ct. Civ. App.), cert. denied, 372 U.S. 913; *Linnecke* v. *Department of Highways*, 76 Nev. 26, 348 P.2d 235; *Piekarski* v. *Smith*, 37 Del. Ch. 594, 147 A.2d 176; *Hoffman* v. *Stevens*, 177 F. Supp. 898 (M.D. Pa.).

3) Consideration of economic effects

Appellants assert that State highway officials failed to comply with the statute in that they did not consider the economic effects of the proposed route as required by the statute (footnote 1).

As set forth above, the Commissioner of Highways opened the public hearing on May 15, 1957, by stating that one of the purposes of the meeting was to hear statements concerning the economic effects of the proposed route of the interstate system both inside and outside the city of Nashville.

Thereafter, the attorney for the State highway department made the following certification:

> "I certify that I am an official of the Department of Highways and Public Works of the State of Tennessee and that the above transcript of the public hearing heretofore conducted regarding the location of the above mentioned project has been read by me. I further certify that said Department has considered the economic effects of the location of said project and that it is of the opinion that said project is properly located and should be constructed as located."

During the three day hearing convened with commendable haste in view of the circumstances the District Court had no practical way of determining to what extent highway officials gave consideration to the economic effects of the proposed route. The record discloses that the attorney who made the foregoing certification is now dead. Former Commissioner Leech testified that his department employed a reputable firm of engineers and that exhaustive studies were made by this firm and by personnel of the highway department.

Under these circumstances we hold that justification existed for reliance upon the presumption of regularity of public records and compliance by public officials with duties imposed upon them by statute. *Helpern* v. *McMorran*, 270 N.Y.S.2d 656, 50 Misc.2d 134.

4) Alleged racial discrimination

Since the date of the public hearing in 1957 approximately 1,100 parcels of property along the proposed route have been acquired both from Negro and white citizens. The costs of acquisition, together with the engineering costs to date, total approximately $10,000,000. Only 25 parcels remained to be acquired as of the date of the hearing before Judge Gray. No discrimination is charged or shown in the condemnation or purchase of property owned by Negro and white citizens or in payment of just compensation therefor.

We find that the record fails to show any intent or purpose of racial discrimination in the selection of the proposed route, that the findings of fact of the District Judge are not clearly erroneous but to the contrary are supported by substantial evidence, and that the District Judge did not abuse his discretion in refusing to deny a preliminary injunction on grounds of racial discrimination.

5) Claimed deprivation of due process and equal protection as matter of law

Appellants contend that, regardless of intent, the result of the construction of the proposed highway would be so injurious to the residents and institutions of the area as to deprive appellants and those whom they represent of due process and equal protection as a matter of law. We do not agree with this contention. In the absence of proof of racial discrimination, we do not consider this matter to be a justiciable issue. The routing of highways is the prerogative of the executive department of government, not the judiciary.

As said by the Supreme Court in *Berman* v. *Parker*, 348 U.S. 26, 35: "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area."

The District Judge was on sound legal ground in refusing to substitute his judgment for that of highway officials in the selection of a route for a highway. *Road Review League, Town of Bedford* v. *Boyd, supra*, 270 F. Supp. 650, 663 (S.D. N.Y.)

It would be virtually impossible to select a route for an interstate highway through a congested metropolitan area without working hardships upon many citizens. Appellants suggest possible alternative routes which they contend would avoid the unfortunate economic consequences which the proposed route will impose upon the North Nashville area. Alternative routes undoubtedly would impose hardships upon others. The minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges. The providing of just compensation to property owners falls within the purview of the laws of eminent domain.

6) Discretion of District Judge

The District Judge, in weighing the equities of this case, could well have reached the same conclusion as did another Court in a somewhat analagous situation in *Road Review League, Town of Bedford* v. *Boyd, supra*:

> "To enjoin defendants at this stage from carrying out the commitment of the federal government to provide 90 per cent of the necessary funds for this project would create a chaotic situation. Plaintiffs argue that the damage to the State could be mitigated, that the rights of way which the State has acquired could be sold or returned to their former owners, that the course of the road could be changed without undue hardship. These arguments do not seem to me to be realistic. Some loss, as for example, engineering expenses, would obviously be irretrievable. In all likelihood, the ultimate loss would

> amount to much more. Substantial delay, perhaps amounting to over two years, would be encountered before a new route could be surveyed and engineered." 270 F. Supp. at 664.

Under the standards of judicial review in this type of action we conclude that, despite the showing of heavy damage to the North Nashville area, we have no choice except to affirm the judgment of the District Court in refusing to grant a preliminary injunction.

7) Possible administrative relief yet available

In his memorandum denying the application for temporary injunction, the District Judge found that "[p]laintiffs have shown that the proposed route will have an adverse effect on the business life and educational institutions of the North Nashville community. The proof shows that the consideration given to the total impact of the link of I-40 on the North Nashville community was inadequate." He pointed out that the business section of Jefferson Street will be "gravely affected." This Court agrees with these conclusions. For example, it is shown that the blocking of other streets will result in a heavy increase in traffic through the campus of Fisk University and on the street between this university and Meharry Medical College. A public park used predominantly by Negroes will be destroyed. Many business establishments owned by Negroes will have to be relocated or closed.

It is to be regretted that appellant's request for a ninety day delay in receiving bids, made shortly before this suit was filed, was denied by both the State Commissioner of Highways and the United States Department of Transportation. If this delay had been granted, perhaps enough problems could have been resolved by engineering and negotiation so that this litigation would never have been initiated. It also is to be regretted that appellants waited so late to begin their efforts to correct the grave consequences which will result from the construction of this highway.

From statements made during oral argument, however, it appears that there yet may be hope that some of the severe damage to the Negro community and institutions can be reduced if not relieved in their entirety. It was stated that the United States Department of Transportation recently conducted a meeting in Nashville with respect to this project and announced that the letting of the contract will not be approved pending further study.

The brief of appellees contains a statement to the effect that under State law contracts are required to be let within ten days after receipt of bids. More than ten days already have elapsed since the bids for this highway project were received.[2] The brief also says that "the record shows that several access ways are already provided and that others can be had if necessary." This, too, is a problem to be solved by engineers and not by judges.

If, as stated in oral argument, the United States Department of Transportation has announced that it will not approve the letting of the contract for this project pending further study, it would appear that final approval of this segment of highway may not yet have been given by that Department. We cannot presume that the Department of Transportation will fail to give consideration to possible revisions in the plans and specifications so as to alleviate as much as feasible the grave consequences which this record shows will be imposed under the present plans upon the North Nashville community.

Another question presented on appeal is whether the District Judge erred in dismissing the case as to defendant Beverly Briley, Metropolitan Mayor of Nashville and Davidson County. The District Court concluded that the Mayor has no jurisdiction over the locating of an interstate highway and could not participate in any decision with respect thereto.

We reverse the order of the District Court dismissing the Metropolitan Mayor as a party defendant to this litigation.

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[2] During oral argument it was stated that the low bidder on this project has waived this requirement for 60 days.

Although the District Court is correct in its conclusion that the Mayor has no legal power to decide the location of an interstate highway, it cannot be doubted that he possesses considerable powers of persuasion and cooperation. We cannot predict the ultimate disposition of this case in the District Court on its merits. It is conceivable that the final solution could require the closing, opening, or rerouting of city streets, rezoning or other municipal action. A correction of these problems could require cooperation among Federal, State and local governments. We consider it proper to retain a representative of the Metropolitan Government as a party defendant.

The stay order heretofore entered by this Court will continue in effect for twenty days from the date of the filing of this opinion in order to maintain the status quo during the period prescribed by Rule 24 of the rules of this Court.

Reversed as to the order dismissing the Mayor of the Metropolitan Government of Nashville and Davidson County as a party defendant. Otherwise affirmed and remanded to the District Court for further proceedings.

Order

No. 18,288

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NASHVILLE I-40 STEERING COMMITTEE, ETC., ET AL.,
Plaintiffs-Appellants,

v.

BUFORD ELLINGTON, GOVERNOR, ET AL.,
Defendants-Appellees.

Before PHILLIPS, PECK and COMBS, Circuit Judges.

It is ORDERED that the opinion in this case, which was announced December 18, 1967, be and hereby is amended by striking the following language from page six of the printed slip opinion:

> "The evidence discloses that this hearing conducted in Nashville was similar to those conducted in all the other ninety-four counties of Tennessee."

and by inserting in lieu thereof the following:

> "The evidence discloses that this hearing conducted in Nashville was similar to those conducted in all other counties in Tennessee crossed by any part of the interstate highway system."

ENTERED BY ORDER OF THE COURT:

/s/ Carl W. Reuss
CLERK

FILED
DEC. 26, 1967
CARL W. REUSS, Clerk

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 18,288

NASHVILLE I-40 STEERING COMMITTEE, an Unincorporated Corporation, and Its Individual Members, etc.,

Plaintiffs-Appellants,

vs.

BUFORD ELLINGTON, Governor, State of Tennessee; CHARLES W. SPEIGHT, Commissioner of Highways, State of Tennessee; and BEVERLY BRILEY, Mayor of the Metropolitan Government of Nashville and Davidson County, Tennessee,

Defendants-Appellees.

BEFORE: PHILLIPS, PECK and COMBS, Circuit Judges.

APPEAL from the United States District Court for the Middle District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed as to the order dismissing the Mayor of the Metropolitan Government of Nashville and Davidson County as a party

defendant. Otherwise affirmed and remanded to the District Court for further proceedings.

The stay order heretofore entered by this Court will continue in effect for twenty days from the date of the filing of this opinion in order to maintain the status quo during the period prescribed by Rule 24 of the rules of this Court.

No costs on appeal awarded either party.

Entered by order of the Court.

CARL W. REUSS
Clerk

Issued as Mandate:

COSTS: NONE

A True Copy.

Attest:

FILED
DEC. 18, 1967
CARL W. REUSS, Clerk

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 995.

NASHVILLE I-40 STEERING COMMITTEE, ET AL.,
Petitioners,

vs.

BUFORD ELLINGTON, Governor, STATE OF TENNESSEE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

For Respondents Ellington and Speight in Opposition.

OPINIONS BELOW.

The findings and conclusions of the District Court are shown in the appendix to the petition, as is the opinion of the Court of Appeals, not yet reported.

JURISDICTION.

The procedural jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Whether the District Court abused its discretion in declining to grant a preliminary injunction restraining respondents from constructing a section of Interstate and Defense Highway I-40 along its planned route through the northern portion of the City of Nashville, Tennessee, upon (1) a claim by petitioners that said routing was racially discriminatory in violation of the Fourteenth Amendment, and (2) the further claim that respondents in 1957 failed to comply with the provision of Section 116 (c) of the Federal Aid Highway Act of 1956 (now codified as 28 U. S. C. 128).

STATEMENT.

The basic facts set forth in the petitioners' summary of proceedings in the courts below are correctly stated. Respondents must emphasize however that the hearing in the District Court was not upon the merits of the case, but only upon petitioners' application for a preliminary injunction pending a trial upon the merits. The hearing was had upon only three days' notice to respondents, two of which were over a week end. Further, the complaint called upon respondents to account for actions and decisions made over ten years ago by persons now dead or no longer readily available as witnesses. It raised questions of fact answerable only by reference to matters contained in a mountain of records accumulated for more than a decade in the archives of the Tennessee Highway Department.

The observations made by the District Court and noted by the Court of Appeals concerning the adverse effect of the highway upon the community in question, and inadequate consideration of that impact, must necessarily be viewed against this background of very short notice afforded to respondents. It is reasonably to be inferred that in a hearing upon the merits respondents can produce much more evidence bearing upon the considerations dictating the route chosen. Respondents did show that in laying out the route in question they followed the recommendations made by the engineering firm of Clarke and Rapuano (Tr. p. 101). No witness from that firm however was called by either side.

Summary of Facts.

The petition correctly describes the subject matter of the suit and its location. It incorrectly however describes the area of north Nashville through which the disputed

highway segment passes as "a Negro ghetto". No provision of Tennessee law or municipal law requires persons of the Negro race to reside in any specified area. While the great majority of residents in the area are of the Negro race, a substantial number of persons of other races also reside there (Tr. pp. 110, 225-226).

Petitioners in the District Court adduced testimony to the effect that the area through which Interstate Highway 40 will pass contains a large majority of the Negro owned and operated businesses in Davidson County, and that most of them are on Jefferson Street; that those on Jefferson Street stand to incur serious damage as the result of the taking of private property for the purpose of said highway, the re-routing of traffic, the widening of Jefferson Street (a project of the City of Nashville), and the separating of said businesses from their customers by the barrier which the interstate highway will create. Further testimony on behalf of petitioners undertook to establish the absence of other commercially zoned property in areas populated by Negroes, and that racial discrimination will operate to bar such businesses from white areas.

Petitioners further undertook to show that in other areas of the City of Nashville the interstate highway plan had been designed to minimize or avoid damage to white owned businesses (Tr. pp. 27-28). The witness who so testified identified himself as a city planner whose residence was in Pennsylvania (Tr. pp. 15-16). Upon cross-examination he stated that his familiarity with the City of Nashville and the routing of the interstate highway within its boundaries had been gleaned from two days spent in the city a couple of weeks prior to the hearing (Tr. pp. 50-51). That visit and his presence at the hearing in the District Court constituted the only times in his life that he had been in Nashville (Tr. p. 50).

Petitioners further endeavored to show that three primarily Negro institutions of higher learning, Fisk University, Meharry Medical College and Tennessee A. & I. State University, all situated in the northern part of the City of Nashville and having substantial capital plants and enrollments would be adversely affected by the proposed routing of Interstate 40. Said route will pass between Tennessee A. & I. University and the other two institutions (Tr. pp. 30-31). It was shown that the campuses of Fisk University and Meharry Medical College stand to be isolated from one another by virtue of an increase in the volume of traffic along Eighteenth Avenue, North, which passes between these two institutions, and that this street will become a major arterial route. The construction and maintenance of city streets is a municipal function, over which respondent State officials have no control. It was testified that the interstate highway in question would tend to isolate a new neighborhood health center planned by Meharry Medical College from the population which it serves, and that many Negro churches stand to be detrimentally affected by the routing in that their properties have been or will be taken, or they will be separated from a part of their membership by it (Tr. pp. 232, 234).

Petitioners introduced into evidence a transportation study of the Nashville metropolitan area and parking studies of the central business district and university center area (an area to the south of downtown Nashville in which are situated Vanderbilt University, Peabody College and Scarritt College) (Plaintiffs' Exhibits 5 and 7). The petition suggests that these studies were part and parcel of the plans evolved by the State Highway Department for the routing of Interstate 40 through Davidson County. An examination of these documents however shows quite clearly that they reflect actions taken long after the proposed routing of Interstate 40 had been completed by the

State Highway Department and accepted by the Federal Bureau of Public Roads. The making of such studies could, therefore, have had no conceivable bearing upon the selection of the route for the highway. The statement of facts in the petition (p. 10) quotes from the opinion of the Court of Appeals, including a statement by that Court "a public park used predominantly by Negroes will be destroyed". This is manifestly an inadvertent error upon the part of the Court of Appeals, for petitioners' own proof in the District Court was that only one-third of said park will be destroyed by the road (Tr. p. 37).

Throughout the petition is a manifest undertaking by petitioners to roll into one ball of wax all undertakings of the State Highway Department and the local government of Nashville and Davidson County having any conceivable relationship to the interstate highway program. This is an error so gross and so calculated to mislead that these respondents feel constrained to demonstrate it to the Court at the very outset. It is clearly shown by the record, and nowhere controverted, that the State Highway Department in designing and routing Interstate 40 followed the recommendations of a competent engineering firm, Clark and Rapuano (Tr. p. 101). This firm was engaged for that purpose by the State following the passage of the Federal Aid Highway Act of 1956, and its recommendations were presented and made public in 1957. It so happened that the same firm had been engaged by the local governments in 1955 for the purpose of evolving a proposed expressway system in Nashville and Davidson County (Tr. pp. 372-409). There was no showing whatsoever that these two distinct undertakings by that firm were necessarily related in any way, and as a matter of law they could not have been.

Possibly because of their previous familiarity with the geography of Davidson County, Clarke and Rapuano

evolved a plan for the interstate system not dissimilar in profile to the expressway routing previously recommended to the local governments.

One of the differences consisted in the layout of the segment of Interstate 40 in dispute in this suit. Under the 1955 expressway plan the western leg thereof would have intersected with the so-called "inner loop" at a point just west of the Nashville downtown area. The southern leg of the "outer loop" would have terminated at its intersection with the western leg of the system at a point some twenty blocks to the west of the downtown area. Under the Interstate 40 plan however the outer loop will continue beyond said intersection and be common with Interstate 40 as it proceeds therefrom in an easterly direction through the area in question, to an intersection with Interstate 265 at a point near Eleventh Avenue and Jefferson Street. In short, the interstate plan will operate to place an adidtional leg on the system and divert northeastward bound traffic from the near downtown area. This is clearly reflected by a reference to the maps in the record. It must be emphasized however that when the petition refers to the Clarke and Rapuano recommendations, it is referring to those made in 1955 by that firm to the local governments, although petitioners would have the Court to infer that reference is had to the recommendations made by that firm to the State, in an altogether separate undertaking in 1957. Respondents and their predecessors in office followed the 1957 recommendations, which they had commissioned the firm to make. Nothing in the record even purports to controvert this point. When the petition states that the Highway Department departed from the engineering recommendations of Clarke and Rapuano, such is true only to the extent that the State did not follow the routing proposed by that firm in 1955 to the local governments in an undertaking to which the State and its officials were utter strangers.

This Court has very recently had the occasion to reaffirm its "two court" rule. That rule is that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". **Graver Mfg Co. v. Linde Co.**, 336 U. S. 271. In the 1967 case of **Berenyi v. Immigration Service** it was recognized that this Court "possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues". 385 U. S. at p. 636.

The case at bar fits wholly within this rule. Both lower courts were able to find no facts to make out petitioners' claim of racial discrimination in the location of Interstate 40. Both found petitioners' proof to go to the wisdom only of the route chosen either could find any purpose to discriminate against Negroes or persons of low socio-economic status.

ARGUMENT.

Respondents would emphasize that the only question entitled to be considered is that of whether the learned District Judge abused the broad discretion vested in him with respect to the granting of temporary injunctions pending a hearing on the merits of a suit for an injunction. The Court of Appeals in an unanimous opinion has held consistent with all of the authorities bearing upon the question that there was no palpable abuse of discretion, whatever view may be taken of the facts. The authorities are too numerous to warrant citation in this brief.

It must be emphasized that petitioners here have sought and continue to seek a thwarting of the lawful processes of government and the clearly expressed will of the people of all of the United States, in unmistakable derogation of the public welfare. Upon the President's recommendation Congress made provision in 1956 for a comprehensive interstate and defense highway system to be completed by the year 1972. It is generally known that that program is now well advanced, though many miles of the roadway remain to be built. What is sought to be enjoined in this case is a very vital link thereof through a very vital area of the State of Tennessee. When it is completed, all that will remain to connect the cities of Memphis and Knoxville, over four hundred miles apart, is a twenty-five mile stretch in the eastern part of the State. Work upon this vital link, scheduled to have commenced in mid-November, has already been delayed for two months, to the possible financial detriment of the State in obtaining a contract therefor, by petitioners' flagrant abuse of the judicial processes. These delays have been trumpeted by petitioners as victories, a fact which is borne out by the newspaper articles upon which petitioners see fit to rely in the absence of legal authority (Petition, pp. 17-18).

Respondents would point out to the Court here that they have communicated to counsel for petitioners their willingness to discuss and consider changes in the design of the highway calculated to improve the access between the areas alleged to have been separated by its routing. This was done following the argument of the cause before the Court of Appeals. No reaction upon the part of petitioners however has been observed, a fact which suggests to respondents that petitioners are more interested in delaying the highway construction than they are in the reduction of its impact upon them.

At the time the instant suit was filed it was a known fact that invitations to bid upon the contract for the construction of the highway segment in question had already been extended and that said bids would be received on October 31, 1967. State law requires that the contract be awarded within ten days from the bid day. Section 54-416, T. C. A. Immediately upon filing this suit to enjoin the construction, petitioners sought a stay order which the District Judge declined to grant in advance of a hearing. When at the conclusion of the hearing he declined to grant the injunction, petitioners moved that a stay order be granted pending an appeal to the Court of Appeals, which motion was not granted. Petitioners then petitioned the Court of Appeals for such a stay order which was granted pending its hearing upon the matter, which hearing was set for December 8, 1967. When the order of the District Court was affirmed, the stay order remained in effect for twenty days under Rule 24. Petitioners waited until the last possible day (as a matter of fact the twenty-first day, the twentieth falling on a Sunday) before filing their petition for certiorari in this Court. As of that time they had succeeded in forestalling the construction of the highway in question for two months merely by the utilization of routine judicial process without any semblance of a finding of substance in their claim. At no time since the inception of this con-

troversy have petitioners offered or recognized any obligation whatsoever to indemnify the public as against any loss on account of these unwarranted delays in the performance of legitimate governmental functions, and there is no indication at the present time that their disposition toward the question is any different. Some $10,000,000 of state and federal funds have presently been spent upon the project in question, and the State has been precluded from executing a very advantageous contract for the construction. It is by no means certain that the contractor will agree to perform it upon the same terms if the State is compelled to delay further its execution thereof. Prices of labor and materials by common knowledge continue to advance, and no contractor can be expected to agree at any time to the same terms he might have found acceptable several months ago.

I.

The Decision Below Is Clearly Correct.

No semblance of federal jurisdiction exists to hear and determine this controversy unless it can be shown that the state action complained of is violative of the Fourteenth Amendment in that it denies to petitioners and those whom they claim to represent the equal protection of the laws. Thus petitioners undertake to make out by their charge that the routing of the interstate in question discriminates against the Negro community of Nashville. There is no evidence whatever in the record that the routing was in furtherance of any purpose to discriminate against anybody. To the contrary, the evidence is that the State Highway Department treated the whole problem as an engineering matter and relied upon the recommendations of a competent engineering firm. Like any highway routing through an urban area, it will cause a certain amount of dislocation to private interests. It has nowhere been even suggested however by any of the proof that anyone having anything to do with the

design or location of the highway undertook to place this burden upon any particular racial group to the exclusion of other such groups.

Petitioners have established only two facts—(1) that some persons will be disadvantaged by the routing of the highway link in question, and (2) that the majority of such persons are Negroes. These facts do not make out racial discrimination. Such would be made out if a purpose to discriminate could be shown either expressly or by necessary inference. No such purpose appears however. What does appear is that State officials were confronted with a necessity of connecting the western leg of Interstate 40 with Interstate 265 at some advantageous point in north Nashville, having due regard for topographical, engineering and distance considerations. In locating said link, they conformed to a straight line more closely than any alternative routing which has been suggested or pointed to by petitioners.

A reference to the map shows that the link in question is but a comparatively small part of an interstate highway complex as projected in the metropolitan area of Nashville. Nashville will constitute the hub of a wheel having six spokes, each of which is an interstate highway. An elaborate network of urban connector routes is essential. They will pass through virtually every sector of the city. These sectors have widely varying racial make-ups. Residences, businesses, public buildings and areas, and churches will be affected to some extent wherever they happen to be in the path of or adjacent to the highway. It is evidently petitioners' feeling however that they should be exempt from the common exposure to the governmental power to locate and construct highways and the necessary exercise of the right of eminent domain.

Petitioners appear to suggest in the introduction to their statement of reasons for the granting of the writ herein

that there exists some judicial obligation to forestall or ameliorate the consequences of the interstate highway program upon persons residing in the slum areas of cities. Implied criticism is levied upon highway designers who route super-highways through city slums, thereby compelling the relocation of "ghetto" families. Such criticism necessarily suggests by implication that the roads should be routed circuitously if they must be, through the more desirable residential and commercial areas, with the attendant huge outlay of public funds which would be necessary to provide just compensation to the owners of these properties. There can be but one answer to such a philosophy. If lay writers of sociological bent are not concerned with the prudent expenditure of public tax dollars, public officials charged with the duty of designing and constructing public highways with those tax dollars must be so concerned. It would certainly make little sense to devote some public funds to slum clearance while at the same time spending other public funds for the purpose of keeping the slums in status quo.

By these statements respondents do not suggest that it would be proper to route highways through the slums when other legitimate conisderations would dictate a different routing. They merely state that the slums are not to be avoided simply because they are slums. No law of which respondents are aware would require them to do so in laying out a highway, or for that matter even permit it. If they undertook to do so we may be fairly certain that the federal highway authority would decline to participate in the project. If slum areas are to be preserved inviolate from intrusion of "great rivers of concrete creeping like lava", respondents suggest that such purpose can be accomplished through legislative action. It is not however a proper function of the courts to guarantee to such communities immunity from the advance of civilization.

The petition, without making reference to any specific instances of such, assumes that State officials in this case "have plainly engaged in racial discrimination". Certainly one who makes such a charge is onerated with the burden of proving it by clear and cogent evidence, and evidence which fairly admits of no other conclusion. Neither of the courts below could find any circumstance reflecting such conclusion, and petitioners have directed the attention of this Court to none.

Petitioners' charge of racial discrimination, if sustained, would raise far more questions than it answers, if they can thwart the construction of a highway upon such a basis and compel it to be re-routed, the effects of which they complain will simply be transferred from them to some other community in urban Nashville. The inhabitants of that community would then be free to come in and bring the same suit that petitioners have instigated here, unless of course petitioners assume that only members of their own ethnic group would enjoy the standing to bring such a suit. If the right to do so be conceded to all equally, then it would have to be concluded that the construction of super-highways through urban areas will be permanently halted.

Petitioners from the outset have with persistence argued that the hearing conducted in May of 1957, pursuant to 23 U. S. C. 128, was not a sufficient compliance with that statute, and that such alleged non-compliance affords grounds to vitiate the entire project. Both the District Court and the Court of Appeals recognized that this federal statute imposed duties enforceable by the Secretary of Transportation or his predecessors having the duty of administering the federal aspects of the interstate highway program. Both Courts cited in support of their conclusion the cases of **Futch v. Greer**, 353 S. W. 2d 896, certiorari denied by this Court 372 U. S. 913; **Linecke**

v. Dept. of Highways, 76 Nev. 26, 348 P. 2d 235; **Piekarski v. Smith**, 37 Del. Chancery 594, 147 A. 2d 176; and **Hoffman v. Stevens**, 177 F. Supp. 898 (M. D. Pa.)

Respondents submit that these authorities are unassailable in logic and reason in their regard of the federal statute in question as establishing standards for the guidance of the federal highway authority in determining the question of federal participation in an interstate highway project. They do not operate to place a sword in the hands of any citizen who may feel himself aggrieved by some real or imagined defect in the procedure followed by state highway departments.

In the instant case the proceedings conducted in Nashville, relative to the entire interstate system in Davidson County, are shown by the record to have satisfied the Federal Highway Administrator, and upon the basis thereof federal participation in the entire Davidson County project was approved (Tr. 390).

If petitioners feel, ten years later, that the proceedings conducted did not meet the conditions laid down by federal law, it would appear that they would have made the federal highway authority a defendant to the suit. The fact is, however, that they did not do so. They prefer for some reason to look upon the statute in question as giving them standing to maintain a suit against state officials independently of the federal authorities. Attention is called to the fact that in those instances where a citizen's standing to rely upon such a federal statute has been upheld, the suits have invariably been brought against a federal agency or officer. **Scenic Hudson Preservation Conference v. F. P. C.**, 354 F. 2d 608 (2nd Cir. 1965); **Office of Communication of United Church of Christ v. F. C. C.**, 359 F. 2d 994 (D. C. Cir. 1966); **Road Review League v. Boyd**, 270 F. Supp. 550 (S. D., N. Y. 1967).

II.

There Is No Conflict of Decision.

Petitioners make no suggestion that the decision of the Sixth Circuit Court of Appeals in the instant cause is in conflict with any other decision upon the same or similar subject matter either by that Court or by any other federal appellate tribunal. To the contrary, their approach to the matter concedes that the precise question which they raise has not been decided any differently by the federal judiciary from the way it was decided by both courts below. There is therefore no warrant for this Court to grant the petition for certiorari for the purpose of resolving a conflict between federal appellate courts.

III.

There Is No Important Question of Federal Law.

No basis urged for federal intervention in the matter of the location of the highway in question is made out in the questions posed by the petition. As hereinbefore noted, the petition charges nothing in the way of state action reflecting a purpose to discriminate against petitioners on account of either their race or their claimed low socio-economic status. All that is shown is that they are mainly Negroes and that some Negroes will suffer economic disadvantage on account of the highway location. Discriminatory effect, absent a discriminatory purpose, has never been shown to afford a basis for the assertion of federal jurisdiction under the Fourteenth Amendment.

A compelling analogy exists between the claim made by petitioners and the one made by appellants in **Wright v. Rockefeller,** 376 U. S. 52. There it was contended that equal protection was violated by a congressional districting plan which resulted in Manhattan's being divided into

four districts having colored populations of 86, 28, 27 and 5 percent, respectively, It was said that this made out a prima facie case of a purpose to discriminate against non-whites. Counsel argued that if the districts were created with race in mind, or if **the results or effect** was to create racially segregated areas, then there was violation of the Fourteenth (and Fifteenth) Amendment. No proof of racial motivation was shown, however. The lower court held there was no violation of equal protection and this Court affirmed, holding that the lower court "was not compelled to find that these districts were the product of a contrivance to discriminate" (p. 57).

Adverse results or effects, standing alone, do not represent denial of equal protection. Intent to discriminate must appear, either positively or by unmistakable inference. The choice of the proposed routing is at minimum just as consistent with an impartial exercise of legitimate judgment as it is with a thesis of discrimination. Such is insufficient justification to overturn the discretion of the trial judge.

Alleged non-compliance with a federal statute directed at the federal government has never been held to afford a basis for federal jurisdiction against those who are not federal officials and in no privity with federal officials. In designing, laying out and proposing interstate highway routings, state officials are not agents of the federal government. They are required to comply with federal standards only as a condition precedent to federal monetary participation in the project. The only consequences which can stem from non-compliance with the statute are non-participation or non-contribution by the federal government. There is nothing in the federal law to prevent a state from constructing the identical project with its own funds if it chose so to do. Here the State's compliance with the federal standard established in 23 U. S. C. 128,

has apparently been wholly satisfactory to the agency charged with the enforcement of such standard, and no question has been raised as against that agency.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

.....,
GEORGE F. McCANLESS,
Attorney General,

.....,
MILTON P. RICE,
Deputy Attorney General,

.....,
THOMAS E. FOX,
Deputy Attorney General,
Attorneys for Respondents
Ellington and Speight.

Certificate.

I, Milton P. Rice, one of the attorneys for respondents in this cause, do hereby certify that I have caused a copy of the foregoing brief in opposition to the petition for certiorari herein filed to be served upon the Honorable Jack Greenberg and Avon N. Williams, Jr. attorneys for petitioners herein, by mailing a copy thereof to them at their last known address, United States postage prepaid.

.....
Milton P. Rice.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 995.

I-40 STEERING COMMITTEE, ETC., ET AL.,
Petitioners,

v.

BUFORD ELLINGTON, ETC., ET AL.,
Respondents.

REPLY

Of Respondent, Beverly Briley, to Petition for Writ of Certiorari.

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Of Respondent, Beverly Briley, to Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

Before and since the enactment of the Federal Aid Highway Program in 1956, The Metropolitan Government of Nashville and Davidson County[1] has been actively engaged in the study and preparation of programs designed to cope with the ever increasing and important problem of urban transportation. One of the first of such studies was undertaken in 1954 when the joint City and County Planning Commission employed the firm of Clark &

[1] The former City of Nashville and the former County of Davidson were consolidated into a metropolitan form of government which became effective April 1, 1963.

Rapuano.[2] As a result of their studies Clark and Rapuano proposed two alternate expressway routes providing rapid transit on the westerly side of the City of Nashville (Tr. 207 through 208, Plaintiff's Exh. 31). Following the passage of the Federal Aid Highway Act in 1956, the City abandoned its expressway plans, deeming the new Interstate Program sufficient for this purpose. The combined Planning Commission, now the Metropolitan Planning Commission, continued, however, to conduct studies relating to traffic congestion and the over-all needs of the community.

In early 1965 and throughout 1966, when it became apparent that the President's Model Cities Program would become a reality, the Metropolitan Planning Commission intensified its efforts in anticipation of being selected as a participant in the program. The result of these efforts was the filing of an application with the United States Department of Housing and Urban Development to participate in the Model Cities Program, designating North Nashville as the target site[3].

Even though the present location of the disputed section of I-40 has remained substantially unchanged since 1957, the first notice of dissatisfaction in its location was brought to the attention of Mayor Beverly Briley on or

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[2] Clark and Rapuano were subsequently employed in 1956 by the Department of Highways of the State of Tennessee to propose a route for Interstate 40 through Davidson County (Tr. pages 55, 56 and 58).

[3] A copy of the transmittal letters and the introduction to the program submitted by the Metropolitan Government to the Department of Housing and Urban Development is contained in Appendix I attached hereto. The entire application comprises 180 pages and is too voluminous to be reprinted here in its entirety. Appendix II contains a reproduction of a telegram from the Department of Housing and Urban Development designating Metropolitan Government, and more particularly the North Nashville community, as a participant in the Model Cities Program.

about September 26, 1967, when he received a telegram from the Campus Development Committee of Fisk University (Tr. page 151). Following the receipt of this notice, Mayor Beverly Briley directed Mr. Karl Stallings, Director of Public Works of The Metropolitan Government of Nashville and Davidson County, to give whatever support he could to the attempts of the Campus Development Committee to obtain a delay in the letting of the construction contracts on the disputed section of I-40 (Tr. Page 163, Plaintiff's Exh. 29). In addition, the Mayor initiated a meeting with the Committee in order to more fully understand their desires and assure them of his support in obtaining administrative relief (Tr. 165). Following this meeting, the next notice received by the Mayor was a summons to appear in the Federal District Court for the Middle District of Tennessee as a defendant against what had now become the I-40 Steering Committee.

Upon the trial in the District Court, the Mayor filed a motion to be dropped as a party-defendant. The District Judge found that since the Mayor was without power of authority to change the location of the disputed Interstate Highway, the motion should be granted and the Mayor dropped as a party-defendant.

On appeal to the United States Court of Appeals for the Sixth Circuit, this action of the District Judge was reviewed and reversed without a finding by the Court of Appeals that the District Judge abused his discretion in dropping Beverly Briley. The Court of Appeals said simply:

> "We consider it proper to retain a representative of the Metropolitan Government as a party-defendant." (Appendix to Plaintiff's Brief, page 16a.)

During the advanced stages of the prosecution of this suit, both the State and the local government have re-

peatedly stated that they stand ready and willing to provide additional over and under passes, frontage roads, and other engineering changes which would lessen the impact of the present location of Interstate 40 on the people affected. Since no substantial protest had been made prior to September, 1967, these commitments, of course, could not have been presented at the preliminary hearing. They are, however, a matter of public record.

ARGUMENT.

The respondent fully appreciates and realizes the tremendous impact the location of Interstate 40 will have on the residents of the North Nashville community. At the same time, however, the respondent also realizes that the over-all needs of the community demand the completion of I-40 through Davidson County. The respondent, therefore, will neither support nor oppose the granting of the writ of certiorari, but wishes simply to present the position of the Metropolitan Government on the case now before this Court. The respondent further realizes that the procedure which is hereby adopted is somewhat unorthodox. Respondent feels, nevertheless, that what is to be said hereafter will materially aid the Court in its disposition of this case.

Of primary importance is the need to have this case disposed of as expeditiously as possible. This case not only involves the last important segment of I-40 to be completed in Tennessee, it also involves the location of other important public improvements and the implementation and carrying forward of the Model Cities Program.

Whether a public improvement involves urban renewal or a National Defense Highway, the location of such projects creates nightmarish problems of economic disruption and relocation under the best of conditions. The North Nashville community is certainly not one with the best of conditions. Its many problems, only one of which is the location of the I-40 Highway, is perhaps best presented in the Metropolitan Government's application to the Department of Housing and Urban Development for a Model Cities Grant.

> "C. Summary of the problems of the designated area
> "Problems of the area include poverty, lack of education and job skills, poor housing, inadequate public

transportation, high crime rate and juvenile delinquency, insufficient communication and contact with the rest of the community, absence of motivation and a lack of health care and social services.

"Living environment is poor. There are is (sic) air pollution and unsightly industrial wastes. The crime rate is about twice that of the rest of the city. Family income is low (in 1959, almost half of the households had incomes less than $3,000). Unemployment is twice that of the rest of the city.

"There is a lack of decent housing and adequate financial arrangements for those who could afford better on present incomes.

"There is a lack of access roads and streets and a need for relocation programs for those who will be displaced soon by interstate routes which will cross the area."

Realizing the inherent problems of the area and the additional problems that will be caused by the location of a National Defense Highway, the executive and legislative branches of government began studies to develop plans designed to substantially reduce and hopefully eliminate the adverse conditions in North Nashville. The result of these studies was the program submitted to the Department of Housing and Urban Development on April 27, 1967. In addition to this major commitment, the local government has itself initiated programs designed to cope with particular problems created by the location of I-40 in North Nashville. One of these programs calls for the construction of the 8th and 19th Avenue North diverters, designed to direct through traffic away from Meharry Medical College and Fisk University.[4]

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[4] The Capital Improvements Budget of the Metropolitan Government of Nashville and Davidson County enacted June 14, 1967 by Ordinance No. 67-216 not only adopts this plan, but contains an authorization for funds for its implementation.

The problems of this area of our community were not caused simply by the location of an Interstate Highway, although this is certainly a major contributing factor. However, the plans now designed and implemented to deal with the North Nashville area take into consideration the present location of I-40. A Court decree which changes this location or leaves its ultimate location in doubt would not only further delay a needed public improvement, but would also require at least the temporary suspension, if not perhaps the eventual abandonment of programs now designed to eliminate or reduce the deleterious effects caused by the present location of the Interstate Highway.

Whether the decision of the Tennessee Department of Highways to locate I-40 where it is was prudent is arguable. Whether an alternate route could have been chosen which would have lessened the impact on North Nashville is likewise open to debate. Whether those persons affected can receive adequate compensation for the economic damage caused by the present location of I-40 is at this point a matter of State law. What remains clear is, the impact on the affected area and the commitments of the local, State, and Federal governments to take steps to eliminate or substantially reduce this impact and that further delay or an uncertain disposition as to the ultimate location of I-40 could result in chaos in, or elimination of present programs involving the North Nashville community.

The plaintiffs, or most of them, have been apprised of these programs and they have been assured of the cooperation of the local government to do all within its power to bring relief not only from the problems caused by the location of I-40, but all of the problems of the North Nashville community.

The position of the Metropolitan Government has been, and still remains, one of concern for the welfare of the

citizens in this affected area. Consistent with this position, the Metropolitan Government simply asks to be allowed to continue the work it has begun, without needless delay or confusion.

Respectfully submitted,

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Of Counsel.

APPENDIX I.

(Letterhead of Metropolitan Government of Nashville and Davidson County, Nashville, Tennessee.)

April 27, 1967

Mr. Ralph H. Taylor
Assistant Secretary for Demonstrations
and Intergovernmental Relations
United States Department of Housing
and Urban Development
Room 1200, P. N. B.
1430 K Street North West
Washington, D. C. 20410

Dear Mr. Taylor:

Submitted herewith is the planning grant application for Metropolitan Nashville-Davidson County. I feel that in this letter of transmittal I should outline several points as it relates to our thinking, which we hope is embodied in the application itself:

1. We have interpreted the Demonstration Cities Model Neighborhood Program to truly be an exercise in "Creative Federalism." Our starting point in the preparation of the application was that in order to make measurable progress in the problem areas with which this program is concerned will require the coordinated efforts and resources of not only the local government but the state government as well as the federal government.

Additionally, I feel that the nature and magnitude of the problems with which we are dealing will require the participation of the private sector of the community in a more significant degree than has been true for many governmental programs in the past.

2. In our thinking relating to the preparation of the planning grant application, we have made certain

judgments concerning the attitude of the citizens who will be affected by this program. This community, perhaps, is not different from many others in the respect that governmental action either from local, state or federal programs has created certain attitudes in the minds of these citizens. To be specific, the optimism embodied in recent federal programs has raised the expectation of citizens in our model neighborhood area significantly. Moreover, at the present time, the citizens in this area are seeing the necessary attendant disruptions associated with the location of an Interstate highway through this area.

Because of these factors, I believe that for this program to be successful will require substantial citizen involvement and participation from the beginning of the program through the planning stage carrying through to the execution of the program components.

Consequently, we have, in our application, taken the view that this is not a program to accelerate already preconceived program components. Even realizing the adequacy of certain existing program components, which we could have written up as part of this application, we feel that citizens in this area, through involvement and participation must come to the conclusion that these are the proper program components in order to achieve the objectives which we will set with them.

We also expect from the involvement of citizens in this area through the project center located in the area, for them to be able to review the present programs of the Metropolitan Government, as they relate to this area. Where these programs do not fit into goals to be established, we hope to be flexible enough during the planning stage to shift direction and embody the thinking of the citizens in our program.

The model neighborhood area which we have selected is an area of our community which has significant prob-

lems in terms of physical facilities as well as unfavorable levels of achievement and economic well being of many citizens in the area. These factors will be reflected in the application itself. However, this area has significant potential we feel, because of the location of the three institutions of higher education in the area; that is, Meharry Medical College, Fisk University and Tennessee A & I University. Due to the location of these institutions and the economic influence which they exert in this area, a significant degree of economic mix exists, and will be built upon to enhance the income level of the area.

Approximately 1500 of the more than 8,000 families in the area receive their basic support from these institutions and the salaries of many of these people compare favorably to the entire community. We believe that the location of this number of institutions in a predominantly Negro neighborhood is somewhat unique. Obviously, these institutions will provide significant leverage points in order to develop and implement programs which will reverse trends toward establishing this neighborhood as a ghetto. Particularly, the potential for developing cooperative educational programs between the above institutions with Vanderbilt, Peabody, Scarritt and other colleges in the community is a promising field.

The Metropolitan Government is uniquely suited to mobilize the resources of the total community, to develop a program for the model neighborhood area. The fact that the Metropolitan Government has both municipal and county jurisdiction combined for the entire county means that the resources of the total community can be brought to bear through an administratively integrated structure.

The planning program is designed to expand the staff of the office of Mayor and to use the power and prestige of the office to focus resources and public attention on the Model Neighborhood Area. Many policies and programs will have to be examined, and in many instances new

approaches will have to be designed in cooperation with the people of the area. We are willing to put the resources and technical staff of the various Departments and Agencies of the Metropolitan Governments into the planning and implementing of this demonstration effort to define and implement creative Federalism.

Respectfully submitted,

Beverly Briley,
Beverly Briley,
Mayor.

(Letterhead of the Tennessee Executive Chamber,
Nashville, Tennessee.)

April 28, 1967

Honorable Beverly Briley, Mayor
Metropolitan Nashville and Davidson County
Metropolitan Courthouse
Nashville, Tennessee

Dear Beverly:

I would like to take this opportunity to congratulate you and Metropolitan Nashville on making application for a program under the Model Cities Act to be conducted in the North Nashville area.

As you know, there are several hundred federal grant-in-aid programs to assist state and local governments. This magnitude of programs makes effective program development and program utilization very difficult. Perhaps the Model Cities Act will permit us to adapt a number of these programs to meet the many needs of this target area.

Tennessee is an urbanizing state and I believe the Model Cities Program will have significant impact on both large and small cities. Since local governments are creatures

of the state, I believe that the state must play an effective role in any such effort so that it may better understand the needs of local government and help coordinate the various programs among the numerous governmental jurisdictions.

I will be most happy to appoint a member of my staff to work with the various state agencies and your staff to assist in the effective coordination of federal-state and local programs in both the planning and programming stages of the Nashville project.

I wish you success in securing an early funding of this project. If I may be of further assistance to you, please feel free to contact me.

Sincerely,

/s/ Buford.

Buford Ellington.

APPLICATION TO THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT FOR A GRANT TO PLAN A COMPREHENSIVE CITY DEMONSTRATION PROGRAM.

A. Identification of Applicant.

1. Legal corporate name of jurisdiction: Metropolitan Government of Nashville-Davidson County, Tennessee.

2. Mailing address: 107 Metropolitan Courthouse, Nashville, Tennessee 37201.

3. Name, title and phone number of official to be contacted regarding this application: C. Beverly Briley, Mayor, 747-4133 or Robert A. Horton, Fiscal Administrative Officer, 747-4667.

B. Date of Application:

1. April 27, 1967.

C. Planning Grant Applied for:

1. Amount of grant applied for:

2. Length of proposed planning period: Twelve (12) months from the date of approval.

D. Certification by Applicant:

The applicant identified above hereby represents that it has or will have available when needed adequate resources to defray, with the requested financial assistance grant, the cost of the preparation of the comprehensive city program; that the data and information submitted in support of and constituting part of this application for a grant are true, correct and complete; and that the undersigned has been duly empowered (1) to submit this request for financial assistance on behalf of the applicant, (2) to provide such additional information and documentation as may be required by the Department of Housing and Urban Development; and (3) otherwise to act as the authorized representative of the applicant in connection with all matters pertaining to this application.

In Witness Whereof, the applicant has caused this application to be duly executed in its name by its undersigned officer (or officers) on this 27th day of April, 1967, in Nashville, County of Davidson, State of Tennessee.

Metropolitan Government of
Nashville-Davidson County,
Tennessee,
Legal name of applicant

By: .....
Signature of authorized officer

Mayor of Metropolitan
Nashville-Davidson County, Tennessee.
Title of authorized officer

Part I. Proposal Highlights

A. Description of Metropolitan Nashville and Davidson County.

Metropolitan Nashville is the second largest of the four major metropolitan areas in Tennessee. Near the geographic center of the state, it is a major center of trade and commerce in the Mid-South. It is governed by the most complete unification of city and county governments of any metropolitan area in the United States. The jurisdiction of the Metropolitan Government is coterminous with the boundaries of Davidson County with all the powers of cities as well as counties under Tennessee general laws.

The Metropolitan Government was created under authority of a home rule charter and is characterized by a strong mayor as the chief administrator. This government with combined city and county authority in effect since April 1, 1963, has far more authority than either of the old forms of competing city and county governments to deal with mounting problems of urbanization.

Metropolitan Nashville and Davidson County encompasses an area of 533 square miles; the urbanized area lies in the approximate center.

Although manufacturing is the largest employment category, the total economy is weighted to the production of services as opposed to goods. Such traditional southern industry as textiles, apparel, furniture and lumber processing predominated until the end of World War II when more sophisticated industries began developing: aircraft, glass, electronics, plastics, appliances.

Diversification and balance are significant in the present economy with 33 percent of non-farm jobs in goods producing enterprises and 67 percent engaged in producing services. This fact is attributable to the three main sup-

ports of the economy, trade, government and the education-medical complex, all of which are services-producing.

Estimated per household income for Metropolitan Nashville in 1965 was $8,059, a favorable position as compared with nation-wide data. However, the 1960 Census showed that 23.5% of Davidson County households had incomes of less than $3,000 in 1959.

B. Description of the designated area: North Nashville.

The designated model neighborhood area, populated by an estimated 46,000 persons, is bounded on the north, east and west by the Cumberland River, on the south by the L & N Railroad tracks and a commercial district.

The area developed in two separate parts: the older section was for many years one of the finest residential areas in the city; the other developed during the depression of the 30's as housing for lower income families.

Racial composition in the designated area in 1960 was 23 percent white; 77 percent non-white. Population and racial ratio are about the same today.

It is an area marked by blight and slums, where dilapidated houses co-exist in the same block with newer houses. It is an area principally made up of single family residences, although there are some "shotgun" type apartment buildings. Population density inside dwelling units is among the highest in the city (1.1 persons per room), although there is not the saturated density of some of the slum areas of larger metropolitan centers. Land use is predominantly residential, but there is considerable commercial and industrial development throughout the area.

C. Summary of the problems of the designated area

Problems of the area include poverty, lack of education and job skills, poor housing, inadequate public trans-

portation, high crime rate and juvenile delinquency, insufficient communication and contact with the rest of the community, absence of motivation and a lack of health care and social services.

Living environment is poor. There are is air pollution and unsightly industrial wastes. The crime rate is about twice that of the rest of the city. Family income is low (in 1959, almost half of the households had incomes less than $3,000). Unemployment is twice that of the rest of the city.

There is a lack of decent housing and adequate financial arrangements for those who could afford better on present incomes.

There is a lack of access roads and streets and a need for relocation programs for those who will be displaced soon by interstate routes which will cross the area.

D. Summary of the goals of the program

Goals of the program for this area center on the general improvement of the environment of the area. These specifically include: better housing, air pollution control, improved access roads, better public transportation, more comprehensive educational programs for adults, a general raising of job skills and income, improved recreational and cultural facilities, improved social service programs and a clearer definition of the roles and goals between public and voluntary agencies.

There must be a reversal of the trend in the racial composition of the population of the area, a breaking up of the ghetto; there must be developed improved communication between and access to the major colleges and universities both inside and outside the area.

There must be storm drainage programs, stimulation of better commercial development and shopping centers, wiser and more restrictive use of land.

E. Summary of priorities of program goals

Housing, health and education would rate highest on the list of priorities of goals in making this designated area into a model neighborhood. These should be attacked with equal vigor to establish a base toward improvement of the area.

Along with these goals, it will be imperative that the desire and intent to improve this area be cooperatively planned and programmed with the residents of the area to the end that these citizens will feel that they are full partners in the governmental processes of this community.

Higher incomes that will accompany increased training and job skills must be produced as rapidly as possible. Efforts must be made all along the way, in the planning and execution stages, to overcome the feelings of alienation and lack of communication among the residents of the area and of the community as a whole.

F. Summary of program strategy

All programs of Metropolitan Government now underway or planned for the designated area will be reviewed and altered in view of recommendations and priorities established for this model neighborhood project. A Model Nashville Citizens Council of 75 members will be established, representative of citizens and institutions inside the area and outside the area where their participation and influence are vital to the implementation of the program. The project office will be established within the model neighborhood, easily accessible to residents of the area. Cooperation and participation by residents of the area will be sought in planning and carrying out projects of this program.

The Metropolitan Human Relations Commission has agreed to delegate and assign a staff member to the task force team which will attempt during the six to twelve

months of this planning program to overcome feelings of alienation and lack of communication as recently evidenced by citizens of the area.

G. Summary of innovative characteristics

Metropolitan Government of Nashville and Davidson County has broad, community-wide powers and authority to implement the model neighborhood program. Under its charter, the administrative head is a strong mayor whose office will direct the administration of the program. The project director will be a special assistant to the mayor. Since the government is the local government of the whole community, it will be able to focus on the model neighborhood the attention of the citizens of the whole community, both those in the central city and those in suburbia.

It is the intent of this proposal to combine civic and governmental authority and jurisdiction toward solving the problems of the model neighborhood. It will provide an opportunity for testing Federal programs and evolving new projects with state and private institutions in the area.

The proposal would employ as leverage points Meharry Medical College, Fisk University and Tennessee State University to increase the economic and racial mix among the population of the area. It would devise new approaches toward motivating action and coordinating the efforts of federal, state and local governments to reverse trends of urban blight.

H. Summary of administrative machinery.

The office of the mayor of Metropolitan Government will serve as the administrative agency for the model neighborhood program. The project director would report to and represent the mayor. There would be three deputy directors assigned to the following areas: (a) human resources

development, (b) physical facilities planning and (c) fiscal affairs and Federal programs.

The technical staff, in addition to the above named positions, employed during the planning period would, at its end be transferred and assigned to appropriate agencies and programs so that the intent of the program may be carried out more successfully.

The project director will serve as chairman of a technical coordinating committee consisting of department heads and directors of Metropolitan Government departments and agencies.

A Nashville Model Neighborhood Citizens Committee of 75 members from both within the designated area and from other parts of the community would be chosen by their groups or institutions and appointed to guide and counsel the development of the program.

APPENDIX II.

Western Union Telegram.

(Received 1967 Nov. 16 PM 1:08, Mayor's Office)

119P Est Nov 16 67 CTA297 BC170

B-WA040 Govt Pd Washington DC 16 Nft

Honorable C Beverly Briley, Mayor of Metropolitan Nashville Davidson County
107 Metropolitan Court House Nash

I am pleased to inform you that the Department of Housing and Urban Development has selected Nashville-Davidson County to participate in the Model Cities Program. You will hear shortly from our regional administrator who will provide you with further information. Congratulations.

Robert C. Weaver, Secretary.